



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 160 OF 2013

CAROLINE WANJIRU WANJIHIA1ST PLAINTIFF

WGK INVESTMENT LIMITED.....2ND PLAINTIFF

Versus

I & M BANK.....DEFENDANT

RULING

Discharge of injunction and provision of security

[1] The Defendant has applied for two significant orders. The first one is that the injunction that was granted on 24th April, 2013 to be discharged, reviewed varied and or set aside. The second one has a twinning; that the plaintiff be compelled to provide adequate security for the outstanding amount; and release the rental income on the charged property to an escrow account. The application is supported by the Supporting Affidavit and Supplementary Affidavit of SRINIVASAN PARTHSARATHY sworn on 23rd January, 2014 and respectively.

[2] The facts of this case are brief. The Defendant advance Over Draft Facility to the 1st Plaintiff in the sum of Kshs. 29,500,000 for purposes of working capital requirements in the ordinary course of business of the 1st plaintiff. The 2nd Plaintiff, charged its property known as Apartment A8, Block A, Tamarind Court, on L.R. NO. 330/593, NAIROBI (hereafter the suit property) and also provided a Corporate Guarantee to the said facility advanced to the 1st plaintiff. The Guarantor undertook to pay to the defendant on demand all money due and owing from the 1st plaintiff to the defendant and discharge all obligations and liabilities of the 1st plaintiff in respect of the overdraft facility herein. The 1st plaintiff defaulted to pay the overdraft facility as agreed and the defendant issued the requisite Statutory Notices; the first Notice was given on 4th September, 2012 but it was for two months. On realization the Notice was not adequate, the defendant issued another Notice dated 7th September, 2013 giving the 1st plaintiff three months to pay the debt due and in default the defendant would exercise its power of sale. By a letter dated 7th September, 2012 the plaintiffs were duly informed that the earlier inadequate Notice had been cancelled. The Plaintiffs did not respond. On expiry of the said Notice of three months, the auctioneer issued a notification of sale of the suit property and the sale was to take place on 12th March, 2013. The 1st plaintiff acknowledged her indebtedness to the defendant in a letter dated 21st January, 2013 by her advocates M/S M.M. KIMULI & COMPANY ADVOCATES and

committed to immediately settle the debt in the account No. *[particulars withheld]*, Kshs. 204,927.89 and account No. *[particulars withheld]*, Kshs. 15,374,412.99. She made a request that the auction be suspended but the request was declined since the defendant had in the past indulged the 1st plaintiff on similar requests but in vain. She implored the defendant further and the sale was called off.

[3] Meanwhile, parties agreed that the plaintiffs would sell the charged property by private treaty within sixty days from 26th February, 2013 and remit the proceeds thereof to the defendant in settlement of the debt due on account number *[particulars withheld]* and the savings account number *[particulars withheld]*. It was also agreed that a letter of Comfort from the Financiers of the purchase was to be sent to the defendant's advocates on or before 15th March, 2013 and in default the sale by private treaty and deposit of the letter of Comfort as agreed, the defendant was to realize the security. These terms are set out in the letter dated 27th February, 2013 written by the defendant's advocates. The plaintiffs defaulted on all the said terms and the defendant instructed the auctioneer to take out the legal steps to advertise the sale of the charged property, which was done and the sale was scheduled for 30th April, 2013. The said advertisement prompted the plaintiffs to file this suit and obtained a temporary injunction against the sale of the charged property until the inter partes hearing of their application dated 22nd April, 2013.

[4] The Defendant now says that the defendant holds a security which is enforceable but it cannot realize it because of the orders of injunction issued herein. It also says that the debt is swelling by the day and now stands at Kshs. 23,713,207.97 and is rendering the security insufficient to cover the entire. The defendant denied it required the plaintiff to pay a sum of Kshs. 70,000 in order to render a statement of the loan account to the plaintiffs -the statement, according to the defendant is intended to injure their reputation as a bank as statements were provided on request. The conduct of the plaintiffs as demonstrated in all the above, shows they are not ready and willing to settle the debt herein. Hence, the need for the plaintiffs to provide security to cover the debt herein and release the rental income from the charged property to an escrow account.

[5] The Defendant further averred that there was no time separate mortgage accounts with the bank were ever consolidated as alleged in paragraph 6 of the Replying Affidavit to this their application. The charge was to secure payment of the overdraft facility, and not the 1st plaintiff's hire purchase facility which was a separate account. Indeed, there is no chattels contract between the plaintiffs and the defendant as alleged in paragraph 7 of the Replying Affidavit. It does not hold any vehicle belong to the 1st plaintiff as security. The true position is that the 1st plaintiff misled the defendant into granting a hire purchase facility towards the purchase of motor vehicle registration number KBK 386J. The said motor vehicle had been sold to a third party in settlement of another creditor on or about 10th March, 2012. But, on or about the 18th May, 2012, the 1st plaintiff had her name inserted in the logbook while the vehicle had already been sold as above. That means she had no good title in the said vehicle which she could offer as security in a hire purchase agreement. These issues on the said vehicle are in issue in CMCC MISC APP NO 561 OF 2012 between JEREMIAH KIARIE MUCHENDU & ANOTHER v CAROLINE WAIRIMU WANJIHIA & OTHERS but it has been extremely difficult to realize the security for the hire purchase agreement as the court file cannot be traced.

[6] There was therefore no consolidation of mortgage accounts with other account except that by a letter of set-off of accounts and securities dated 20th January, 2010 the 1st plaintiff irrevocably authorized the defendant to realize the securities and apply the proceeds to debts in other accounts held in the bank and apply all payments received in respect of any designated accounts to any other accounts held in the bank.

[7] In all the above arguments, the defendant is not faulting the court in issuing the injunction as alleged by the plaintiff in paragraph 12 of the replying affidavit. It is simply stating that those orders were issued ex parte without the participation of the defendant and the court did not have the advantage of the information now being given by the defendant. The plaintiff did not make full

disclosure when obtaining the ex parte order of injunction yet they are using the said relief to prevent the realization of the security. The plaintiffs have no cause of action against the defendant.

[8] The defendant filed submissions in which they exemplified the above averments. In the submissions, the defendant makes a case for the review, discharge, setting aside and or variation of the injunction herein. They cited order 45 rule 1(1), order 40 rule 7 and order 51 rule 7 of the Civil Procedure Rules, 2010 on review, and setting aside of injunctions respectively. They also cited several judicial decisions namely; 1) **Reef Building Systems Ltd v Nairobi City Council NBI HCCC NO 1357 OF 2001**; 2) **Edward Karanja Ragui v National Bank of Kenya NBI HCCC NO 95 OF 2002**; and 3) **George Muraya Kiriria v A.M. Ename [2006] eKLR**. Ringera J (as he then was) handled the first two cases and Kihara J (as he then was) handled the last case, but in their respective judgments held that an injunction is an equitable remedy and is amenable to being set aside or varied or discharged by the court if its sustenance will be contrary to the ends of justice which it was intended to serve when it was issued. Both emphasized that the court has wide and unfettered discretion is so doing. The defendant quoted yet two other case of **Haithara Haji Abdi v Dubai Bank Ltd & Another [2013] eKLR** and **R v BPRT & Two others [2014] eKLR** where Havelock J and Odunga J also applied similar reasoning as Ringera J and Kariuki J above quoted. The defendant is convinced that the injunction is unjust and inequitable to maintain it. Despite acknowledgement of indebtedness and undertaking to pay, the plaintiffs have made no effort to date to settle the debt. The failure to pay the debt brings the risk of the debt outstripping the security thus rendering it inadequate. The conduct of the plaintiffs raises questions whether they are entitled to an equitable relief. They plaintiffs have merely questioned the interest without tendering any evidence to rebut the provisions of the facility letter or the mortgage. They did not establish any prima facie case with a probability of success. See Nyamu J (as he then was) in **Maithya v HFCK & Another [2003] E.A. 133** on interest. Taking the above into consideration, the defendant was of the view that convenience tilted in refusing the injunction. Those who seek equity must do equity; in this case they must service the loan. In any event, the injunction offends order 40 rule 2 which entitles an ex parte application to last for not more than 14 days. On that basis, the orders should be reviewed.

[9] The defendant referred to the valuation report dated 25th March 2013 which placed market value of the charged property at Kshs. 15,500,000 and forced value at Kshs. 11,600,000. Under order 40 rule 2(2) of the CPR, the court grants an injunction on such terms as to an inquiry as to damages, keeping of an account, the duration of the injunction, giving of security or otherwise. The plaintiff acknowledged indebtedness of Kshs. 15,579,340.88 in their letter dated 21st January, 2013 which was already beyond the value of the security. Now it is swollen to Kshs. 23,713,207.97 which is hopelessly way beyond the security. These matters would require the plaintiffs to provide security which is adequate to cover the entire debt and all accrued interest. The release of the rental income of the charged property should be held in an escrow account in the best interest of justice. A dispute as to accounts is not a ground for granting an injunction against the exercise of the chargee's power of sale. See **Gachibi v HFCK LTD [2007] eKLR** and **Francis JK Ichatha v HFCK LTD CA NO 108 OF 2005**. The plaintiffs should not expect to be aided by the court in reaping from their own default. The allegations that defendant irregularly compounded accounts, withheld funds and diverted the same for unknown purposes are unfounded. The court should call for security and payment of the income from the suit property into an escrow account. The defendant beseeched the court to allow their application.

The plaintiffs opposed application

[10] The Plaintiffs filed a replying affidavit to the defendant's application. The Replying Affidavit is sworn by the 1st plaintiff on 28th February, 2014. The plaintiffs did not, however, file submissions as order by the court but I will consider the Replying affidavit nonetheless. The 1st plaintiff avers that the defendant offered her an overdraft facility on conditions precedent contained in the schedule thereto. The conditions were validly executed in the letters of guarantee and indemnity as follows;

- a) Personal Guarantee and indemnity for Kshs. 10,000,000 to be executed by JOSEPH GITHU KIMEMIA.
- b) Letter of set-off to be executed by the 1st plaintiff together with Fixed Deposit Receipts for funds to be held under lien for Kshs. 16,393,941.00.
- c) Letter of set-off to be executed by the 1st plaintiff t/a C.W WANJIHIA & COMPANY ADVOCATES together with Fixed Deposit Receipts for funds to be held under lien for Kshs. 4,279,799.00.
- d) Letter of set-off to be executed by the 1st plaintiff t/a C.W WANJIHIA & COMPANY ADVOCATES together with Fixed Deposit Receipts for funds to be held under lien for Kshs. 2,140,250.00.
- e) First legal charge/mortgage for an amount of Kshs. 10,000,000 over property known as Apartment No. A8, Block A, Tamarind Court on L.R. NO 330/593 Thompson's Estate, Lavington, Nairobi which is registered in the name of the 2nd plaintiff.
- f) Corporate Guarantee of the 2nd plaintiff for Kshs. 10,000,000 executed under the company seal.

[11] According to the 1st plaintiff, the defendant has adequate security for the overdraft facility. The rights of set-off have never been utilized before the defendant could sell the charged property. The 1st plaintiff contended that her inability to repay as agreed was partly occasioned by the defendant when it purported, and without notice to the 1st plaintiff to consolidate separate mortgages with the claim for mortgage thus loading up interest which distorted the repayment sums. The claim in paragraph 7 of the supporting affidavit is a chattels contract where the defendant is holding on to the 2nd plaintiff's logbook of motor vehicle in the joint names with the defendant. The chattel contract cannot be consolidated with the overdraft. The statutory notices issued did not address the overdraft or monies held as security to the defendant's rights of lien and set-off. The notices were off setting all the debt upon one property without proper accounts being made on the securities held. The offer to settle amounts owed in two accounts namely the overdraft and current account were rejected. Similarly, the attempt to sell the property by private treaty was thwarted by the threat of execution and strict deadlines given by the defendant in proclaiming the suit property. The plaintiffs filed suit when they realized the defendant was holding crucial details on the status of account and the fixed deposits and the status of these accounts have not been disclosed even in the affidavits filed by the defendant. The 1st plaintiff averred that she has been willing to pay the debt were it not for the withholding of information on the accounts by the defendant. The orders sought will only be granted after the inter partes hearing of the plaintiffs' application for injunctions. They cannot be granted as prayed for and the application should just be dismissed.

THE DETERMINATION

[12] I see a preliminary matter-whether the application by the defendant is feasible in law given that the one for injunction is still pending? The plaintiffs seem to suggest that the application by the defendant is premature because it has been made when the substantive application by the plaintiffs for injunction is pending. I also find it curious for the plaintiffs to argue that the application is faulting the court in granting the *ex parte* injunction. Although the arguments by the defendant would largely be made in response to the substantive application for injunction, nothing in law would prevent the defendant from applying for *ex parte* orders of injunction to be set aside or varied or reviewed or discharged in a separate application made before the main application for injunction is heard. An *ex parte* order including a temporary injunction is amenable to being set aside or varied or discharged or reviewed before an inter partes hearing is had. Such general and

unfettered power to set aside an ex parte order is drawn from Order 51 Rule 15 of the Civil Procedure Rules. But, I should think, that coupled with Order 40 rule 7 of the Civil Procedure Rules, a litigant gets a complete scheme of adjudication of such a matter involving an ex parte injunction. And it will not be objectionable for one to cite or rely on both rules just to avoid any doubt. No doubt, the order of temporary injunction by Havelock J on 24th April 2013 by Havelock J was granted ex parte, and is amenable to being set aside or reviewed or varied or discharged without the necessity of the defendant having to wait for the substantive application for injunction to be heard. There are good reasons why the law has taken that approach. If for a moment the approach being proffered by the plaintiffs is to prevail in law, it would be an impediment to the right to access to justice. Such approach will also offend the principle of justice that justice should be done to all parties-as undoubtedly, it would place the defendant at the mercy of the plaintiff who for the fact of the injunction may temporize the case for as long as possible. It is not uncommon and many unscrupulous plaintiffs have been tempted to go to slumber after obtaining an injunction. Without passing any judgment, I note that, since the plaintiffs obtained *ex parte* injunction they have not set their application down for hearing. And nothing substantial has been done by the plaintiffs in the matter except some talks that there were some preliminary negotiations between the parties, but which did not yield any settlement- the plaintiffs went to slumber until the defendant re-awakened this matter by filing the application to set aside the *ex parte* injunction. At some point on 11th February, 2014, the plaintiffs' counsel M/S MUTUA tried to have their application consolidated with the one by the defendant on the basis that both applications are different sides of the same coin. M/S NGONDE, counsel for the defendant opposed the attempt and insisted that their application should be heard alone since the plaintiffs had slept on their application and were doing nothing to fast track it. She did not want to be sucked into the plaintiffs' inertia. Despite the court noting the dilatory conduct of the plaintiffs, it nonetheless adjourned the application by the defendant to another date for hearing and allowed the plaintiffs time to file their replies to the application herein. Worth of noting, the plaintiffs are yet to fix their application for hearing.

[13] What I stated earlier on ex parte injunctions will be understood better when one fathoms that *ex parte* injunctions are granted without the advantage of evidence by the other party, yet they could be hugely injurious to the defendant. That explains why the law was amended to provide in Order 40 rule 4(2) of the Civil Procedure Rules that...***“An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days”***. Little reading reveals the law has emphasized the need for applications- where an ex parte injunction has been granted- to be heard expeditiously and ruling thereof to be delivered as quickly as possible. It is not surprising that the law envisages a lapse of even an injunction which was granted inter partes unless the suit itself is determined within twelve months from the date of issue of the injunction or is extended by court for sufficient reason. See rule 4, 5 and 6 of Order 40 of the CPR. Therefore, it will be against the constitutional principles of justice to ordain as law that a defendant should wait until the application for injunction is fully heard before he can apply for an ex parte injunction granted therein to be set aside. Thus, I hold that the application before me is not premature as it has been argued by the plaintiff; it is properly before the court and I will determine it on merit.

Propriety of ex parte injunction herein

[14] After all I have stated the big question is: Does the ex parte injunction issued on 24th April 2013 violate Order 40 rule 4(2) of the Civil Procedure Rules? I will reproduce the rule once again:

“An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days”

The actual words used by Havelock J were, that:-

‘I grant prayers 1 & 2 of the Plaintiff’s Application dated 22/4/22013 with the exception that injunctive orders will only be in place until the hearing of the said application inter partes. That hearing will be on 7th May 2013 before any judge of the Commercial Division of this Court’.

[15] Unfortunately and it is the source of trouble here, the last part of the order was omitted in the formal order which was extracted and served. I repeat the omitted portion: **That hearing will be on 7th May 2013 before any judge of the Commercial Division of this Court’.** Surely, it does not require high wit to see that the order as granted by the learned judge did not last for more than fourteen days as it was to subsist from 24th April, 2013 to 7th May 2013. Thus, for as long as the defendant argues that the order issued on 24th April, 2013 is irregular for violating order 40 rule 4(2) of the CPR, is erroneous and untenable in law. Parties should always peruse the record when applying. Equally, it is a legal requirement that orders should be drawn in accordance with the order of the judge keeping as much as is possible to the relevant words used by the judge rather than draw them as they appear in the application.

[16] That aside, the said order was only extended by the court in two other occasions, that is, on 7th May 2013 up to 14th June 2013, and on 30th July 2013 until 30th August, 2013. Those orders were not extended again and by law they lapsed on 30th August 2013. There is no order of injunction, ex parte or otherwise in existence in this matter. There is therefore nothing to discharge at this stage. Requests for undertaking to damages will not arise in the circumstance. Such request will be tenable in the hearing of the pending application so that the defendant will claim damages should the court eventually find the injunction ought not to have been granted in the first place. The other request for extra security or receiving of the rental income of the charged property into an escrow account bears profound connotation in the law on mortgages and I think it needs a serious treatment by this court. I will do so below.

Provision of extra security and receipt of income

[17] As I have stated, the requests by the defendant that this court; a) compels the plaintiffs to provide extra security to augment the charged property; and b) makes a receiving order of the income from the charged property into an escrow account, are fundamental aspects of the law on mortgages and charges. The Land Act has specifically provides for the remedies of the chargee which includes; a) suing for money owing where the security is rendered insufficient due to the wrongful act of the chargor and the chargor has refused to give additional security; b) appointing a receiver of income of the charged property; c) leasing the charged property; or d) entering possession of the leased property. The focus of this ruling will be on reliefs (a) and (b) above. Section 91 of the Land Act is specific and allows the chargee to sue for money owing where security offered has been rendered insufficient by the wrongful act of the chargor. But before the chargee files a recovery suit under section 91 of the Land Act, the chargor ought to have given the chargor reasonable opportunity to provide additional security and the chargor had failed to do so. Again, these limitations appear under section 91(3) of the Land Act which empowers the court to postpone proceedings for recovery of sums owing where the security has been rendered insufficient due to the wrongful act of the chargor unless the chargee has exhausted all the other remedies relating to the charged property or the chargee has discharged the charge. Therefore, the chargee may be required to exhaust all the other remedies provided in section 90 and 91(1) (b) of the Land Act before an order for recovery of the sum owing is made on the basis of insufficiency of initial security. That brings me to the other request to receive the rental income of the charged property into an escrow account.

[18] Receipt of income of the charged property towards repayment of a loan secured by a charge is one of the reliefs the chargee has against the chargor under section 90(3) (b) of the Land Act. Section 92 of the Land Act provides specifically for the relief of *receiving income of the charged property, appointment, powers, remuneration and duties of the receiver*. Under the said section, there shall be an implied condition in every charge that the chargee shall have the power to

appoint a receiver of the income of the charged property. But before making such appointment of a receiver for the income of the charged property, the chargor must give a notice of not less than 30 days in the prescribed form for that purpose and inform the chargee of the relief the chargee intends to take. After the expiration of the notice, the chargee will appoint a receiver of income of the charged property in a formal instrument in writing and signed by the chargee. The process, therefore, for receipt of income as a chargee's remedy must adhere to the procedure prescribed by the Land Act and cannot be circumvented by an application in court as it has been done here. The relief cannot be obtained from the court through an application such as this before the relevant notices and instruments relating to the appointment of a receiver have been issued and executed, respectively. The court will only come in if the chargor is resisting the appointment of or the actual possession or receipt of the income of the charged property by the receiver. See the relevant parts of section 92 of the land Act below on appointment and duties of receiver:

92. (1) It shall be an implied condition in every charge that the chargee shall have the power to appoint a receiver of the income of the charged land.

(2) Before appointing a receiver under this section, the chargee shall serve a notice in the prescribed form on the chargor and shall not proceed with the appointment until a period of thirty days, from the date of the service of that notice, has elapsed.

(3) A chargee shall appoint a receiver, in writing, and the chargee shall sign the instrument of appointment.

(4) A receiver may, at any time, be removed and a new receiver appointed, in writing, by the chargee.

(5) A receiver appointed under this section shall be deemed to be the agent of the chargor for the purposes for which the receiver is appointed, and the chargor shall, unless the charge instrument provides otherwise, be solely responsible for the acts and defaults of the receiver.

(6) The receiver shall have the power to demand and recover all the income of which the receiver is appointed, by action or otherwise, in the name of the chargor, and to give effectual receipts for the same.

(7) The receiver shall be entitled to retain, out of any money

received, all costs, charges and expenses incurred by receiver and, for a commission at the rate specified in the appointment, but not exceeding five per centum of the gross amount of all money, received, or, if no rate is so specified at the rate of five per centum or any other rate as the chargor and chargee may agree or if the appointment of a receiver comes before the court, which the court considers fit.

(8) The receiver shall apply all money received in the following order of priority—

(a) first, in the payment of all rents, rates, charges, taxes and other outgoings required to be paid in respect of the charged property;

(b) second, in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the charge of which the receiver is appointed;

(c) third, in payment of the receiver's commission and expenses;

(d) fourth, in payment of all reasonable expenses incurred in the doing of anything that a receiver is required or entitled to do in respect of the charged

land, including but not limited to—

(i) the payment of any premiums on any insurance policy properly payable under the charge instrument; and

(ii) the costs of undertaking necessary and proper repairs to any buildings comprised in the charged land as directed in writing by the chargee,

(e) fifth, in the repayment of any money paid or advanced by the chargee to meet the reasonable expenses referred to in paragraphs (a), (b), (c) and (d) together with any interest on any amount so paid or advanced at the rate at which interest is payable on the principal sum secured by the charge;

(f) sixth, in payment of the interest accruing due in respect of any principal sum secured by the charge;

(g) seventh, in and towards the discharge of the principal sum secured by the charge, and payment of the residue, if any, to the chargor or other person entitled to the charged land.

[19] In the circumstances, the court is not able to grant the orders compelling the plaintiffs to provide an additional security or receive the income of the charged property in an escrow account. The arguments that the security will be rendered insufficient or that the plaintiffs have not been repaying the loan are useful in the application for setting aside the ex parte injunction- if at all any existed- and in opposition to the application for injunction herein or any attempt to obtain or renew the expired ex parte injunction. For those reasons, I refuse the application by the defendant. I make no order as to costs in view of the circumstances of the case.

Dated, signed and delivered in court at Nairobi this 12th day of November, 2014

F. GIKONYO

JUDGE