



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 468 of 1998

BELGUT ENTERPRISES.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

On 4th June, 1999, I gave a ruling in which I issued orders of injunction in favour of the plaintiff against the defendant restraining the defendant, its servants and agents from selling or interfering with the plaintiff's land known as L.R. KERICHO/KAPSOIT/8 pending the hearing and determination of this suit.

The plaintiff has yet brought another application in which it has prayed for 6 (six) substantive prayers.

I will reproduce them: -

(2) THAT this honourable court be pleased to restrain the defendant either by itself, its agents, servants or otherwise howsoever from further breaching the terms of the loan agreement as provided for in the charge and debenture dated 17th April, 1989 between the parties herein by charging interest rates exceeding 18% per annum.

(3) THAT a mandatory injunction be issued against the defendant either by itself, its agents, or otherwise howsoever compelling the defendant to make calculations of the plaintiff's account in accordance with the agreement between the parties, that is an interest rate not exceeding 18 % per annum, and come up with the true figure which the plaintiff is liable to pay to the defendant.

(4) THAT alternatively this Honourable court do proceed to take its own accounts under Order XIX and get the proper outstanding loan between the parties or adopt the plaintiff's calculations of Kshs. 9, 145, 168/- as the outstanding loan balance between the parties.

(5) THAT the plaintiff/applicant be allowed to deposit the said sum of Kshs. 9, 145, 168/- in court as the full and final amount outstanding on account of loan granted to the plaintiff.

(6) THAT upon the deposit of the said sum of Kshs. 9, 145, 168/- in court the defendant be ordered to discharge and release to the plaintiff the security securing the loan namely Title Number KERICHO/KAPSOIT/8.

The application is brought under Order XXXIX r.2 Order XIX of the Civil Procedure Rules, the Judicature Cap. 8, Laws of Kenya, Section 3A of the Civil Procedure Act and all enabling provisions of

the law.

The application is based on 4 grounds in the body of the application and an Affidavit sworn by Evans Ben Kibisu, the plaintiff's accountant. There are annexures to the said affidavit.

Mr. Kibisu swears that the defendant Bank advanced the plaintiff company a sum of shs.12 million in or about 1990. That the said loan was advanced pursuant to a charge and debenture both dated the 17th April 1989. That according to the agreement between the parties the maximum interest rate, which the defendant was allowed to charge, was 18% per annum. That the defendant has been charging interest over and above the agreed rate of 18% per annum in breach of the agreement. That the plaintiff has paid a total of Kshs. 16, 972, 222 towards the loan account but the defendant has made calculations on breach of the agreement and is demanding over Shs. 63 million from the plaintiff and has threatened to recover the said sum in breach of the terms of the agreement.

Mr. Kibisu further swears that the court has found that the defendant is in breach of the agreements referred to above and complains that despite the court's finding, the defendant continues to breach the agreement between the parties by maintaining the loan account in breach of the said agreements. He swears, that it is necessary to have the defendant restrained otherwise it will continue to keep and maintain the plaintiff's account in breach of the agreement between the parties.

Mr. Kibisu swears that the plaintiff has on its own prepared the accounts in accordance with the agreement between the parties and found that only a sum of Kshs. 9, 145, 168/- is due.

Mr. Kibisu then prays for orders in the application.

The application is opposed. Grounds of opposition have been filed.

There are six of them. I have perused them. A replying affidavit sworn by Mr. George K. Kang'ethe has also been filed. It has no annexures.

Mr. Kang'ethe swears that he is an Advocate of the High Court of Kenya and is practicing as such in the firm of M/S Mereka & Company Advocates. That he is in conduct of the defendant's case.

Mr. Kang'ethe further swears, that what the court found in its ruling of 4th June, 1999, was that the defendant had "prima facie" contravened the terms of the loan agreement between the parties on the issue of maximum interest and it categorically stated that the defendant can only explain why it did so at the full hearing of the case.

Mr.Kang'ethe further swears that the issues between the parties were not conclusively determined, That the court has ordered that the suit go to hearing to determine certain prayers in the earlier interlocutory application.

Mr.Kang'ethe swears that the prayers sought were adequately dealt with during the hearing of the earlier application.

Mr. Kang'ethe further swears, that the method used by the applicant to arrive at a figure of Shs. 9, 145, 168/- is obviously erroneous and since the sum is admitted it ought to be ordered to be paid.

Mr.Kang'ethe also swore that he had filed a Notice of Appeal against the ruling of 4th June 1999 and that if status quo was maintained the plaintiff would not suffer any prejudice as it enjoys orders of injunction against the defendant.

Mr.Konosi, Advocate appeared for the plaintiff/applicant while Mr.Kang'ethe Advocate appeared for the defendant/respondent. In my most respectable view, each of the said Advocates put his respective client's case well. I have considered their respective submissions although I have not repeated all what they said in this ruling.

Order XXXIX r.2 of the Civil Procedure Rules is in the following terms: -

2(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction, on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court thinks fit.

(3)-----

(4)-----

There are two principal documents forming the agreement between the parties in this case. There is a charge over L.R. No. KERICHO/KAPSOIT/8 and a debenture both dated 17th April 1989.

According to the two principal documents the amount to be secured was not to exceed shs. 15,000,000/-. But this amount was together with the interest to be charged on the amount advanced.

It does not appear to be in much dispute that the amount advanced to the plaintiff was shs. 12 million. However, the interest rate was to be between 15% and 18%. The defendant according to the said documents was at liberty to charge the rates of interest between 15% and 18% without having to advise the plaintiff. However, the debenture provides the following in paragraph 2(b);

(b) THAT such interest shall in no event be charged at the rate exceeding 18% per annum without the company's consent (which consent must be signed by any director of the company and once again shall be irrevocable.)

In the attached ruling of 4th June, 1999, I said the following about the rates of interest charged the plaintiff by the defendant.

The defendant has admitted in Exhibit 5, that it has been charging compound interest at 40%. This was clearly in breach of the agreement between the parties. The unlimited power the defendant had to increase interest rates without notice to the plaintiff was limited to only 18% per annum.

It is not denied that the principal sum advanced was paid and some interest thereon.

The balance of the loan, which is now over shs.63 million, has been arrived at by calculations, which have been made in breach of the agreement between the parties. It has not been denied or even suggested that the defendant will not stop maintaining the account in breach of the contract between the parties.

The plaintiff has been willing to redeem the security but the defendant's breach has and will make it impossible if not difficult. I think under the circumstances the plaintiff is entitled to the orders sought in prayer 2 of the application.

Apart from generally saying that the plaintiff's calculations are wrong the defendant has not assisted the court on how the calculations based on the agreed rates of interest should have been made. All what Mr.Kang'ethe said is that the plaintiff agrees that he owes the defendant the sum of shs.9 million plus and should be ordered to pay it to the defendant. What I understand the plaintiff to be saying is that it is prepared to pay the said sum of shs. 9,145,168/- in full and final settlement of the claim.

The defendant claims a sum of shs.63 million. This figure is obviously arrived at in applying interest rates which were never agreed at by the parties. The plaintiff has made its calculations. The figure found by the plaintiff is shs. 9,145,168/-. But this figure was made on March 1998. By March, 1999, another 18%

should have been added. This would bring the figure to shs.9,145,168 + 1,464,130= 10,791,298. Then there are 4 months from March, 1999. The interest for the four months is shs.35,971. Total is shs. 10,827,268/-

I would allow prayer 4 of the application and find that the outstanding balance of the loan is shs. 10,827,268/- being deposited in court, the same will be deposited in an interest earning account in a Bank of good repute in the joint names of the Advocates for the parties. Once this is done, the defendant will sign a discharge and release the same with the Title documents to L.R. No. KERICHO/KAPSOIT/8 to the plaintiff. Once that is done the Advocates for the parties will release the sum of shs. 10,827,268/- with the interest earned thereon to the defendant.

Mr. Kang'ethe rightly argued that allowing prayer 6 would be allowing the plaintiff to enjoy orders which are in the nature of final orders. I have anxiously considered this aspect of Mr.Kang'ethe's submission and I am of the view that in a case of this nature, once the amount of loan is known the plaintiff would be at liberty to redeem his securities at any time especially as no date of redemption appears to have been fixed in the charge and the debenture.

The result is that this application succeeds and there will orders as hereinbefore stated. The costs of the application will go to the plaintiff.

Dated and delivered at Nakuru this 16th day of July 1999.

-D.M. RIMITA

JUDGE

16.7.99