



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 136 of 1996

1. COMMERCIAL EXCHANGE LIMITED

2. FRANCIS NJOROGE MWANGI.....APPELLANTS

AND

BARCLAYS BANK OF KENYA LIMITED.....RESPONDENT

(Being an appeal from the ruling and order of the High Court of Kenya sitting at Nairobi (Hon. Mr. Justice Moiwo Ole Keiwua) dated 11th July, 1996

IN

H.C.C.C. NO. 1112 OF 1996)

JUDGMENT OF THE COURT

During the year 1991 the first appellant sought a loan facility from the respondent (the bank) and the bank agreed to grant such facility. The purpose of the loan was to provide working capital for the business of the first appellant. The loan was secured by various properties charged to the bank. Some of the properties belonged to the second appellant and others to some of his relatives. In addition to the security of the properties there was also a floating debenture and guarantee by the directors of the first appellant.

The first appellant kept on servicing that loan (the first loan) by paying a sum of shs.12,000/- per month.

Thereafter the first appellant applied for and obtained further facilities from the bank on the strength of the same securities. These facilities were:

(a) A loan facility of shs.2,500,000 to complete the Construction of commercial building in Murang'a; and

(b) An overdraft of shs.3,000,000/= to provide for the

Distributorship and wholesale business of the first appellant.

The bank upon releasing the second loan deducted the outstanding unpaid balance of the first loan that is a sum of shs.437,800/= from the overdraft facility, aforesaid, of shs.3,000,000/=. This was in January,1992.

Again in June, 1992 the first appellant applied for and obtained further facilities from the bank. These were:

- (a) A loan facility of shs.4,400,000/= to complete the Construction work; and,
- (b) An overdraft facility of shs.4,000,000/= to run the first appellant's business.

The bank, upon releasing the third loan of shs.4,400,000/=:, deducting the outstanding balance of the second loan in the sum of shs.2,291,865/=:.

Then, in October, 1993 the bank agreed to grant the following facilities:

- (a) Overdraft of shs.3,000,000/= to provide working Capital for the distributorship and wholesale business of the first appellant.
- (b) A loan facility of shs.6,075,000/= to complete the Construction of the aforesaid commercial building.

The bank, upon releasing the fourth loan of shs.6,075,000/= deducted the outstanding balance of the third loan in the sum of shs.4,110,267/75.

The appellants, so long as, the facilities kept on coming, did not object to the bank deducting the outstanding balance(s) of the previous loan. On being specifically asked this question, Mr. Akhaabi for the appellants said that only verbal complaints were made. But is clear that the appellants were quite happy with the status quo so long as the question of repayment did not become a pressing issue.

It is not in dispute that all facilities granted remained payable on demand in accordance with the normal banking practice. It is also not in dispute that the securities in question were perfected. Interest rates, commission charges and negotiation fees were also all agreed and confirmed.

When the first appellant was pressed to pay the loans and the overdraft and when the bank threatened to auction the charged properties the appellants sued the bank, to stop it from selling some 19 properties charged to it to secure the loan(s) and the overdraft(s). This was in H.C.C.C. No. 889 of 1996. In that suit the appellants were seeking orders very similar to those in H.C.C.C. No. 1112 of 1996 the ruling wherein (by Ole Keiwua J.) is the subject – mater of the appeal before us.

In H.C.C.C. No. 887 of 1996 the parties recorded the following consent orders before Ole Keiwua, J. on 2nd May,1996:

- (a) By consent parties to negotiate and settle the matter within fourteen (14) days from 2/5/96.
- (b) Without prejudice to the exercise of power of sale by the defendant should such negotiations fail, the sale of the charged properties for today and tomorrow 2nd May, 1996 and 3rd May,1996 be postponed.
- (c) The defendant be at liberty to re-advertise the charged properties for sale at the plaintiffs' cost.
- (d) The plaintiffs' do deposit Kshs. 3,500,000/= before the negotiations with the defendant can start and if any amount is not deposited within (14) days from to-day's date the negotiations will be deemed to have failed, and the defendant may proceed in terms of orders (1), (2), and (3) above to realize the securities.
- (e) The plaintiffs to pay all costs incurred so far in advertising the charged properties for sale

including legal fees and auctioneer's charges in any event within (14) days from today.

The appellants did not pay the sum of shs.3,500,000/= by 16th May, 1996 and instead on 7th May, 1996 after discontinuing H.C.C.C. No. 887 of 1996 filed H.C.C.C. 1112 OF 1996 yet again seeking similar orders. The learned judge seeing the futility of being bogged down to decide whether the consent order of 2nd May, 1996 amounted to an issue already adjudicated upon, heard the application of the appellants. Similarly he decline to hold whether or not the second suit and application before him was an abuse of the process of court. It is unfortunate that the learned judge did not go into those issues but it appears crystal clear to us that as the appellants were unable to pay the sum of shs.3,500,000/=: a legal ingenuity was employed. This was discontinuance of the former suit and the filing of the fresh suit. But Mr. Akhaabi, however, conceded that discontinuance of a suit does not affect consent orders already made in that suit. To our minds, whatever the financial predicament the appellants were in, they used the process of court wrongfully in attempting to seek yet again orders very similar to those sought in the earlier case, after recording the afore-mentioned consent orders. We would think that as the judge was minded to dismiss the application he was simply being kind to the applicants.

It does not augur well for an applicant to say that he is yet again before the court after discontinuing his case but without disclosing the reasons for such discontinuance and without informing the court, at least at an ex-parte stage, that certain far-reaching consent orders were made in the previous suit.

The learned judge declined to grant the injunction sought on what before him turned out to be a dispute as to the amount due. Before us, Mr. Akhaabi stated categorically that the amount in question was not in dispute. His argument centered on the fact of deductions made by the bank when granting the second, third and fourth of the loans referred to above. Basing his arguments thereon Mr. Akhaabi urged that his clients were not bound to pay even a single cent to the bank as the actions of the bank were tantamount to a "complete breach of the agreement between the defendant (the bank) on the one hand and the first appellant and the second appellant on the other hand:.. That 'breach' Mr. Akhaabi was prejudicial, oppressive and unconscionable. He did not cite any authority to support this extraordinary submission which in our view was made with a tongue in the cheek. The appellants wanted to buy time, it appears, and they have managed to buy some time. Yet, they have made no payment(s) towards reduction of the debt. The world of business cannot survive if such frivolous applications are allowed.

It also bears pointing out that if there was any breach on the part of the bank in relation to the loan(s) and overdraft(s), no attempt was made to quantify the damage(s), if any, suffered by the appellants. Simply to say that no sum of money is payable on account of breaches is not sufficient to entitle one to the remedy of injunction for which one has to firstly, establish a prima facie case with a probability of success, and, secondly, that damages would not be an adequate remedy. The appellants fail on both limbs of Giella v Cassman Brown guidance and therefore the balance of convenience need not be looked into.

In the upshot, this appeal is simply frivolous and unmeritorious and is dismissed with costs but we do not certify for two counsel.

Dated and delivered at Nairobi this 3rd day of July, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR