



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE NO.124 OF 2013
CANELAND LIMITED.....PLAINTIFF
VERSUS
AFRICA BANKING CORPORATION LIMITED.....DEFENDANT

RULING

1. **Caneland Limited**, the Plaintiff, filed the notice of motion dated 22nd February 2016 against **African Banking Corporation**, the Defendant, for temporary stay of execution of court ruling dated 8th February 2016, pending the lodging of their appeal. The notice of motion is based on the four grounds on its face summarized as follows:-

- a). That the statutory notice had not been served on the Plaintiff and therefore the Defendant's power of sale had not crystallized.
- b). That the Plaintiff has filed a notice of appeal in respect of the ruling dated 8th February 2016 and unless the order is stayed, the Plaintiff stands to suffer substantial loss and damage if its properties are irregularly sold.
- c). That the Plaintiff is prepared to furnish reasonable security for the intended stay.
- d). That there is need to maintain status quo until the appeal is heard.

2. The application is also supported by the affidavit sworn by **Surjit Singh**, a director of the Plaintiff, sworn on the 22nd February 2016 in which he among others deponed to the following:

- a) That on 30th April 2009, the Defendant advanced to the Plaintiff Kshs.135million which was secured on a charge, on **Kisumu/Municipality Block/171.The correct reference should read Kisumu/Municipality Block 7/171**].
- b) That over time, a dispute between the two parties arose over the outstanding amount leading the Defendant to instruct Nyaluayo Auctioneers to auction the charged property.That the said Auctioneers served the deponent with thenotification of sale but failed to serve the Plaintiff prompting him to commence this suit to protect the company assets.
- c) That the court dismissed the application for injunction through its ruling dated 8th February 2016 and the Plaintiff filed a notice of appeal after being aggrieved by the said ruling.

d) That there is need to issue a temporary stay of the ruling dated 8th February 2016 so as to maintain the status quo pending the filing of the intended appeal as it would take some time to obtain the required documents.

3. The application is opposed by the Defendant through the replying affidavit by **Agatha Kiattu**, the legal manager of the Defendant, sworn on 8th March 2016 in which she among others depones to the following;

a) That in view of the court's ruling of 8th February 2016, the notice of motion dated 22nd February 2016 is frivolous and vexatious and is meant to delay the exercise of the Defendant's statutory power of sale which has arisen.

b) That the Plaintiff has not made any payments for 33 months since May 2013 when the application for injunction, which was dismissed on 8th February 2016 was filed.

c) That what the Plaintiff seeks is an equitable remedy while the Plaintiff has not demonstrated goodwill by making payments on the loan account.

d) That the Plaintiff is not the legal owner of the charged property and hence had no legal capacity to file the suit and the application in view of the decision in **Nairobi Mamba Village -V- National Bank of Kenya Limited Nairobi HCCC No.1838 of 2001** where it was held that only the chargor could challenge the exercise of power of sale.

e) That the Plaintiff knew that charged properties become commodities for sale and there would be no irreparable loss suffered even if such property was sold.

f) That the claim that the Plaintiff was not served with notification of sale was not raised during the hearing of the injunction application.

g) That a dispute on the amount outstanding is generally not enough to be the basis of issuing temporary injunction.

i) That as of 1st March 2013, the Plaintiff was indebted to the Defendant for Ksh.42,234,450/03 which sum has continued to accrue interest from that date.

4. The application dated 22nd February 2016 was placed before the court on

10th March 2016 which certified it urgent and directed that it be served for hearing on a date to be fixed on priority basis. On the same date the application was fixed for hearing on 12th April 2016. That on 24th March 2016, the Plaintiff filed a certificate of urgency to the effect that the Defendant had advertised the charged property **Kisumu/Municipality block 7/181** for auction on 31st March 2016. The matter was placed before the Deputy Registrar on the same date who granted temporary stay in terms of prayer 2 pending interpartes hearing on 12th April 2016. The parties counsel then appeared in court on 20 April 2016

when directions were issued on filing written submissions on the notice of motion dated 22nd February 2016. The counsel for the Plaintiff filed their submissions dated 19th May 2016 while the Defendant's counsel filed their undated submissions on 20th May 2016. The submissions are as summarized herein below;

a) **PLAINTIFF'S COUNSEL'S SUBMISSION;**

i) That the Plaintiff had commenced this suit and filed an application dated 21st May 2013 seeking temporary injunction to stop the Defendant from offering for sale two properties L.R. **Kisumu/Municipality Block 7/171 and 181** which had been charged to the Defendant to secure certain financial facilities. That the application was dismissed as lacking in merit on the 8th

February 2016.

ii) That the ruling of 8th February 2016 meant that the Defendant was at liberty to sell the charged properties and the Plaintiff being aggrieved by the said ruling filed the notice of appeal.

iii) That the current application for stay is pursuant to **Order 42 Rule 6 (2)** of the Civil Procedure Rules which requires the Applicant to demonstrate that the appeal has been filed, that substantial loss would occur if stay is not granted, that there has been no unreasonable delay in filing the application and demonstrate the willingness and ability to furnish security for the due performance of the decree or order sought to be appealed as may ultimately be binding on him.

iv) That the Plaintiff has satisfied the first condition under **Order 42 Rule 6(4)** of Civil Procedure Rules by filing the notice of appeal on 18th February 2016 as required under **Rule 74 of the Court of Appeal Rules**. That in respect of the substantial loss, the Plaintiff submits that if the charged properties are sold before the main suit is heard and determined, the Plaintiff will have lost the right to pursue the court, of action and the right of the court to hear and determine the matter. Thus, the Plaintiff submits, is a loss, so substantial that it is incapable of being quantified. The court was referred to the case of **ANTOINE NDIAYE -V- AFRICAN VIRTUAL UNIVERSITY [2015] eKLR**.

v) The Plaintiff also submitted that they filed this application without delay and has offered to provide security which must be reasonable.

vi) That contrary to the Defendant deposition, this court's jurisdiction while dealing with the application for stay under **Order 42 Rule 6** of the Civil Procedure Rules, is restricted to the four areas of consideration and the court need not consider the merit or demerit of the ruling being appealed against.

vii) That the overriding objective requires that stay orders be granted instead of allowing the Defendant to sell the charged property and open battle ground for recovery of the properties or their values if they are sold and the Plaintiff emerges victorious on appeal.

viii) That the intended appeal will be prejudiced unless the property is preserved. That without the properties, a pursuit of the appeal will be pointless and the appellate court will itself be acting in vain.

b) **THE DEFENDANT'S COUNSEL'S SUBMISSION;**

i) That the application is frivolous and vexatious and should be dismissed with costs as it is only brought to delay the exercise of the bank's statutory power of sale.

ii) That the issues raised in the application have been addressed by the court in the ruling. That the Plaintiff has not denied owing the Defendant, but has not made any payments to the bank since filing this suit in May 2013.

iii) That the redemption sum continues to increase due to accrued interest and could likely outstrip the value of the charged properties. That the bank is merely a custodian of its customers deposits which it holds in trust and those defaulting in servicing their loans are likely to lead to the collapse of the bank occasioning suffering to its customers.

iv) That the sale of the charged property would not occasion the Plaintiff substantial loss as it was aware when it offered the properties as security, that they became commodities for sale whose value can be ascertained and paid in damages if the sale is later faulted.

v) That the Plaintiff was not the owner of the charged properties and the Defendant was therefore not obligated to serve it with the notification for sale which issue was not even raised during the

injunction application hearing. That as held in **Nairobi Mamba Village - - National Bank of Kenya Nairobi HCC NO.1838 of 2011**, the Plaintiff had no proprietary interest over the charged properties and could not stop the Defendant from the intended sale which was to be carried out pursuant to the exercise of the contractual and statutory power of the chargee contained in the charge to which the Plaintiff was not a party.

vi) The Defendant also referred to the court of Appeal decision in **Venture Capital and Credit Ltd -V- Consolidated Bank of Kenya Ltd Nairobi** Case No.349 of 2003 where at page 360, paragraph (b) the court held that as the Applicant was not the owner of the charged property, it would not lose any proprietary right to the property even if it was sold in the exercise of the bank's statutory power of sale. That likewise, in the instant case, the charged properties are owned by **Surjit Singh and Masket Singh** and the Plaintiff herein lacked the legal capacity to bring this suit and the application as it has no proprietary interest in the property.

vii) That the supporting affidavit to the application dated 22nd February 2016 is defective as it offends **Section 34 and 35 (1)** of the **Advocate Act Chapter 16 of Laws of Kenya** for failure to carry the endorsement of the person or firm of advocate who drew, prepared and filed it. The Defendant referred to the case of **Jeremiah Ogola Dunga -V- Coopers Motors Corporation (K) Ltd** Nairobi HCCA NO.41 of 1998, where the court declared an affidavit that did not bear the endorsement of the Advocate or firm that drew and filed it as incurably defective and struck it out for offending the mandatory provisions of **Section 35 (1)** as read with **Section 34** of the Advocates Act.

viii) That the ruling of 8th February 2016 dismissing the Plaintiff's application for injunction did not make any formal positive order that is capable of being stayed by way of an order of stay of execution. The court was referred to the decision in **Samwel Owino, Denis Ochieng and Twelve others -V Municipal Council of Kisumu HCCA NO.106 of 2005** and **Venture Capital and Credit Ltd -V- Consolidated Bank of Kenya Ltd**. In the latter case, the court of Appeal held as follows:

" the first prayer for an order of stay of execution of the ruling and order of Ibrahim J (as he then was) dated 24th October 2003 is misconceived as the learned Judge never made any positive order in favour of the Respondent which is capable of execution. Rather, the learned Judge merely dismissed the application for interlocutory injunction with the result that neither party was given any interlocutory relief."

The Defendant submitted that likewise in this case, there is no order capable of being stayed in the ruling of 8th February 2016.

ix) That the Plaintiff has not detailed in what respect it stands to suffer substantial loss if the charged properties are sold. The Defendant referred to the case of **Anne Muthoni Mwangi -V- Vijay Morjaria** [2005] eKLR, **I.T. Inamdar, Subodh Inamdar, Samir Inamdar -V- Postal corporation of Kenya** Nairobi H.C.C.C NO.1629 of 2000 and **Caneland Ltd, Malkit Singh Pandhal, Surjit Singh Pandhal -V- Delphine Bank Ltd, Kisumu** C.A. NO. NAI 344 OF 1999 (139/99 UR).

In the latter case the court pronounced itself as follows:

" we now turn to apply these principles to the fact of the present case. Let us say at once that it was nowhere alleged by the applicants in the supporting affidavits or otherwise that the Respondent will be unable to refund to the Defendants any sums of money paid in satisfaction of the decree. The onus was on the applicants to satisfy the court on this issue. Upon a careful consideration of all the materials available to us we are unfortunately not satisfied that this onus has been discharged. There is nothing to show that the appeal will be rendered nugatory if a stay is not granted. On the contrary, it appears to us that the respondent is not a bank of straw and can meet or refund any sums of the money paid to it. This being the

case and our view of the matter, we are satisfied, on a balance of probabilities, that if a stay is not granted the appeal will not be rendered nugatory. The applicants having failed to satisfy us on this condition their application must fail."

5. The court has carefully considered the grounds on the notice of motion dated 22nd February 2016, the affidavit evidence by both parties, the written rival submissions by both counsel, decided cases referred to and come to the following determinations;

a) That the Plaintiff contention that they filed the application without delay and that they have filed an appeal by virtue of the notice of appeal filed on 18th February 2016 has not been challenged by the Defendant.

b) That the ruling of 8th February 2016 related to notice of motion dated 24th May 2013 in which the Plaintiff sought for temporary injunction restraining the Defendants from advertising for "**sale the Plaintiff's securities being KISUMU Municipality Bloc 7/171 and 181**" pending the hearing and determination of this suit. That the court considered the materials presented before it and in its ruling of 8th February 2016, at paragraph 26 held as follows;

" 26. when all this is considered, it becomes clear that the Plaintiff is not one deserving of favourable consideration by a court of equity. The Plaintiff's application herein is therefore unmeritorious and dismissed with costs."

c) That the court ruling of 8th February 2016 did not amount at restoring or according the Defendant any right or interest that it did not possess before the ruling that can be stopped through an order of stay. The scenario before this court is more or less similar to that addressed by the Court of Appeal, whose decisions are binding on this court, in the case of **Venture Capital and Credit Ltd -V Consolidated Bank of Kenya Ltd** (Supra) where the court declined to grant an application of stay of the High Court Order dismissing an application for injunction in the following words;

"... the learned Judge never made any positive order in favour of the Respondent which is capable of execution. Rather, the learned Judge merely dismissed the application for interlocutory injunction with the result that neither party was given any, interlocutory relief."

d) That even though the Plaintiff alleged on grounds 2 of the notice of motion that "**unless a stay is granted, the Plaintiff/Applicant stands to suffer substantial loss and damage if its properties are sold irregularly without compliance of the law,**" the supporting affidavit does not contain any deposition giving the nature and details of the imminent substantial loss and damages that the Plaintiff is likely to suffer if stay is not granted. [see **I.T. Inamdar & 2 Others -V Postal Corporation of Kenya Nairobi HC.C.C NO.1629 of 2000 and Anne Muthoni Mwangi -V- Vijay Morjaria [2005] eKLR.]**

In the latter case the court held as follows:

" it is not enough for a party to simply depose that he will suffer substantial loss unless stay of execution is granted. It has to be shown in a detailed manner how that substantial loss will be occasioned....."

That further to the foregoing the pleadings herein including the supporting affidavit sworn by **Surjit Singh** on 21st May 2013 in support of the notice of motion of even date at paragraph 3, the two charged properties are registered in the names of **Surjit Singh and Malkiat Singh**. The deposition reads as follows:

" 3. That I know as of personal knowledge that the facilities were secured by two legal charges created over parcels of land known as Kisumu Municipality Block7/171 AND 181

and registered in the names of SURJIT SINGH & MALKIAT SINGH."

The Plaintiff was aware of that fact when filing the plaint dated 21st May 2013 as at paragraph 6 it averred as follows;

" 6. It was also agreed and covenanted between the parties that the facilities, advances and financial accommodation would be secured by legal charges created over two parcels of land known as KISUMU MUNICIPALITY BLOCK 7/171 (sic) and KISUMU MUNICIPALITY /BLOCK 7/181 and registered in the names of the plaintiff directors."

That superior courts have pronounced themselves in several cases on who between the borrower (Principal debtor) and the chargor (guarantor) has locus standi to obtain an injunction against the chargee. That in the case of **Nairobi Mamba village -V- National Bank of Kenya Ltd** [2002 J.I EA 197 at page 199, Ringera J (as hethen was) held as follows;

" None of the English cases cited on behalf of the Plaintiff show that the principal debtor can sue and obtain relief on behalf of the guarantor."

Let me also say that the Plaintiff has an interest in the charged property for it is both the security for the indebtedness and the location of its business. However such an interest doesnot suffice to give it locus standi to obtain an injunction against the chargee. The debtor's interest it has in the property is not a proprietary interest therein and it does not in my view give it standing to question the exercise of the power of sale".

That the court of appeal in the case of **Venture Capital and Credit Ltd -V- Consolidated Bank of Kenya Ltd** (supra)while addressing a similar situation stated in the second last paragraph of the ruling dated 8th January 2004 as follows;

" ... the suit property does not belong to the Applicant. The owner of the property M/S Komorock View Estate Limited is not a party to the suit and has not challenged the intended exercise of statutory power of sale by the Bank. So even if the suit property is sold the applicant will not lose any proprietary right to the property.In the circumstances, if the appeal succeeds, damages would be the only relief appropriate to the Applicant. It has not been, said that the Respondent's bank has no means to pay compensation that may be ordered."

e) That flowing from (d) above, the Plaintiff herein, not having any proprietary rights over the said charged properties do not stand to suffer any loss that can be classified as substantial, even if the Defendant's intended exercise of their power of sale is actualized. It is also clear that their appeal would not berendered nugatory as there is nothing presented before this court to suggest that the Defendant would be unable to satisfy any order for compensation likely to be made in favour of the Plaintiff.

f) That the Plaintiff has not disputed the existence of a debt on the facility with the Defendant. The dispute appears to be the interest charged which issue wasconsidered in the ruling of 8th February 2016. The chargor were duly served with the requisite notices as confirmed at paragraphs 4 of the affidavit sworn by **Surjit Singh** on 22nd February 2016 where he deponed as follows:

" 4. That on 10th April 2013, the Respondent through Nyaluoyo Auctioneers served me with a Notification of sale herein annexed and marked "SS 1" yet I'm only a guarantor to the plaintiff."

That the chargor (guarantor) have not challenged the Defendant's exercise of the power of sale and as shown above, the Plaintiff has no locus standi to do so, and the notice of motion dated 26th February 2016 is therefore without merit.

g) That the court uphold the submission by the Defendant counsel that the supporting affidavit

sworn by **Surjit Singh** on 22nd February 2016 in support of the instant notice of motion of even date do not contain an endorsement to show who drew and filed it. That this offends the provisions of **Section 35(1)** as read with **Section 34 of the Advocates Act** Chapter 16 of Laws of Kenya. The supporting affidavit is therefore incurably defective and is hereby struck out. As was held in the case of **Jeremiah Ogola Dunga -V- Cooper Motors Corporation (K) Ltd** [2005] eKLR and **Abdi Ali Nur -V- Transami (Kenya) Ltd** [2005] eKLR where the court struck out the affidavit for failure to contain the endorsement of the person who drew and filed them, the supporting affidavit filed in support of the notice of motion dated 22nd February 2016 is similarly struck out. This leaves the notice of motion without evidence and it must inevitably fail.

6) That the sum total of the foregoing is that the Plaintiff notice of motion dated 22nd February 2016 is without merit and is hereby dismissed with costs. The interim orders of stay granted by the Deputy Registrar on 24th March 2016 and severally extended is hereby vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 13TH DAY OF JULY 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Mashinde for Plaintiff/Applicant.

Mr Kowino for Manezes for Defendant/Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016

13th July 2016

S.M. Kibunja J.

Parties absent

Mr Mashide advocate for Plaintiff/Applicant

Mr. Kowino for Menezes for Defendant/Respondent

Court; The ruling delivered in open court in presence of Mr Mashide for Plaintiff and Mr. Kowino for Menezes for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

13/7/2016