



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI. 217 OF 1998 (87/98 UR)
(CORAM: GICHERU, SHAH & OWUOR J.J.A)
BETWEEN

D. J. LOWE & COMPANY LIMITED.....APPLICANT

AND

BANQUE INDOSUEZ.....RESPONDENT

**(An application for injunction pending appeal against the
Ruling of Honourable Justice Waki at Mombasa on 19th
August, 1998,**

in

H.C.C.C. NO. 35 OF 1997)

RULING OF THE COURT

We have before us an application expressed to be brought under rules 5(2)(b) and 42 of the Rules of this court. The applicant is a Limited liability company known as D. J. Lowe & Company Limited.

On 30th October, 1997 the superior court (Waki, J) dismissed an application by the applicant seeking to restrain the respondent bank (Banque Indosuez) from appointing a receiver over the applicant's property and from selling its assets as well as its landed property known as sub-division No.1280 of section 1, Mainland North Mombasa, title No. C.R. 11898. The learned judge held that the applicant had failed to establish a case with probability of success and that in any event the loss that could be suffered by the applicant was not irreparable. Even on balance of convenience the learned judge found in favour of the respondent bank.

The applicant has not lodged an appeal against the refusal by the learned judge to grant the restraining orders.

The applicant however applied for a review of the orders made by Waki, J. On 30th October, 1997 by an application lodged in the superior court on 5th May, 1998 but dated 29th April, 1998. The ground on which the review was sought was that the respondent bank had not credited the applicant a sum of US Dollars 291,857.34 received by the respondent and that that fact was not known to the applicant at the time the application for injunction was heard. The applicant was saying in effect that that fact of non-crediting of US Dollars 291,857.34 to its account was a discovery of a new and important matter which entitled it an apply for a review under Order 44 rule 1 of the Civil Procedure Rules.

The applicant had not included in its application before us the response to its director's affidavit in support of the review application which response was by way of an affidavit of Mr. Joel Darendeau, the

Mombasa branch manager of the respondent bank. The annexures to Mr. Darondeau's affidavit showed that the applicant was aware of and had countersigned all accounts documents in respect of the said sum of US Dollars 291,857.34 and that it was aware of it as early as durinTgh et hea ppyleiacra t1i9o9n5 .before us seeks an injunction restraining the respondent itself, its servants, agents or representatives from advertising, selling, appointing a receiver or in any other manner whatsoever disposing of the applicant's aforesaid property pending the hearing and determination of the intended appeal which intended appeal is of course against the learned judge's refusal to review and the application thus purports to be, indirectly, an effort to effectively reverse the effect of the orders of the learned judge whereby he declined to grant the injunction on 30th October, 1997. The principles applicable for grant of an injunction by this court would be more germane if the applicant had sought to appeal against the ruling of 30th October, 1997.

This particular application we have before us stems from, as pointed out, refusal to review the order of 30th October, 1997. Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

In this particular case the evidence of payment of US Dollars 291,857.34 was easily available to the applicant. Hence, there was no merit in the application for review. In these circumstances we see no arguable point that the applicant can put forward in the intended appeal. Therefore on the very first limb of the two main principles upon which this court grants injunctions, namely that there is an arguable appeal, the application fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 9th day of October, 1998.

J. E. GICHERU

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.