Silpack Industries Ltd v ABSA Bank PLC & another (Commercial Case E230 of 2024) [2024] KEHC 9919 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9919 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E230 OF 2024

A MABEYA, J

JULY 31, 2024

BETWEEN

SILPACK INDUSTRIES LTD ..... PLAINTIFF

AND

ABSA BANK PLC ..... 1ST DEFENDANT

SBM BANK KENYA LIMITED ..... 2ND DEFENDANT

RULING

1. Before Court is an application dated 30/4/2024. It is brought under Order 40 Rules (1), (2), (3) and (4), Order 50 Rule 1 of the *Civil Procedure Rules 2010*, section 63(c) of the *Civil Procedure Act*, 2010.

2. The application sought that the defendants be restrained from issuing statutory notices of sale and from disposing the property known as LR No 209/4270 ("the suit property"). That the defendants be restrained from calling the plaintiff's loan facilities with the defendants as contained in the facility letters 20th and 26th May, 2022 by the 1st and 2nd defendant, respectively.

3. It further sought a mandatory order directing the defendants to release to the plaintiff the sums amounting USD 214,015,279.35 and USD 2,159,032.42 respectively for rebuilding the factory.

4. The application was based on the grounds set out on the face of it and the supporting affidavit of Parit Narendra Shah sworn on 30/4/2024. The plaintiff alleged that before June, 2022, it obtained a facility from I&M Bank which was secured by a debenture and a charge over the suit property. That it was a condition of the financing that the suit property would be insured on a Fire Industrial All Risks Insurance Policy from 1/10/2021 to 30/9/2022 and the same was obtained from APA Insurance Limited. The insurance cover was for Kshs 2,092,500,000/.

5. That the plaintiff thereafter entered into negotiations with the defendants to transfer the plaintiff's banking facilities with I&M Bank where the 1st defendant would offer a facility of USD 6,500,000 and the 2nd defendant USD 6,500,000.00 and Kshs 25,000,000/-, respectively. That however, the property was damaged by a fire on 15/6/2022 causing 87% damage to the factory. That the defendants still agreed to offer the facility and the compensation money for the damage was disbursed on 29/7/2022 after the fire incident.

6. That at the time of the loan disbursement by the defendants, only 13% of the original assets remained as the fire destroyed the rest of the property. That at the time of the fire, the defendants had no claim in the insurance policy which was paid by APA Insurance amounting to Kshs 1,186,437,725/-. It was contended that the plaintiff's intention was to rebuild the factory and was of the idea that the defendants had the same intention.

7. That APA Insurance remitted the compensation proceeds to the defendants on behalf of the plaintiff but the defendants retained part of the proceeds thereby hindering any reconstruction of the factory. That the plaintiff's ability to pay the facility was based on its ability to start over and continue trading. That the defendants retained the compensation money in an escrow account unilaterally and after payment of various liabilities, there was a balance of Kshs 502,463,546/- which amount could not be utilized to rebuild the factory.

8. The plaintiff faulted the defendants for forcing it to agree on having the money used for forex trading to the benefit of the defendants. That it would be exposed to losses if the situation is not remedied as it would continue to be unable to trade. The defendants would not be prejudiced as the plaintiff holds assets valued over Kshs 1B.

9. The 1st defendant opposed the application vide a replying affidavit dated 21/5/2024 sworn by Faith Mutuku, Head of Business support and recoveries. She confirmed that a facility of USD 6,500,000 was advanced to the plaintiff and the suit property was charged as security. That the 1st defendant created a debenture in its favour over the assets of the plaintiff.

10. That it was a condition of the Letter of Offer that the plaintiff would take out an insurance cover from a licensed company which the plaintiff complied with. The plaintiff informed the 1st defendant that there was fire in its factory but that the risk was insured and the 1st defendant continued with the takeover. It was averred that the proceeds of the insurance policy were paid to the 1st defendant in accordance with the Letter of Offer and charge document.

11. The 1st defendant contended that the 1st installment of the insurance compensation was paid directly to the plaintiffs account without consideration of the 1st defendants' rights under the Letter of Offer. That the 1st defendant was willing to apply the insurance proceeds to reduce the plaintiff's debt and then forward the balance to the plaintiff for reconstruction. That the funds could not be released to the plaintiff since they were meant to secure the 1st defendant's exposure.

12. The 2nd defendant opposed the application vide a replying affidavit of Kevin Kimani sworn on 21/5/2024. It contended that vide a Letter of Offer dated 26/5/2022, it agreed to take over the plaintiff's facility with I&M Bank. That the plaintiff notified the 2nd defendant of the fire incident at the factory which destroyed the plaintiff's assets. That the plaintiff had no claim on the insurance money since the defendants were the first loss payees of the money. That the agreements did not stipulate that compensation would be availed to the plaintiff and that the transaction was completed because there was the assurance of the insurance cover.

13. The 2nd defendant contended that the parties had agreed on the inter-lenders agreement that all monies received would be used to compensate any expenses or costs arising from the facility. That any discussions on reconstruction had no connection with the insurance money. That the plaintiff had fallen into arrears to the tune of USD 4,300,423.26 and Kshs 25,361,855.70 respectively and that the combined amount owing outstrips the value of the suit property which is in the region of Kshs 600 million. That the plaintiff had not met the threshold for an interlocutory injunction.

14. The application was canvassed by way of written submissions which were ably highlighted by learned counsel. The plaintiff submitted that there was a consensus between the parties that the plaintiff would repay the loan from the proceeds of trading and not from insurance compensation. That the insurance funds was to be utilized for the restoration of the buildings, plant and machinery.

15. That further, the defendants would benefit more from the reconstruction since the assets in security would increase. Mr. Sheth, Learned Counsel for the plaintiff submitted that the insurable value of the assets as at the time the securities were perfected was about Kshs 200M only. That on *prima facie* basis, the plaintiff submitted that the money could only benefit it since the loan was disbursed way after the fire incident had occurred. That damages will not be adequate to reinstate the company which had been thriving for close to 40 years and that the balance of convenience tilts in its favour. That in order to defeat the cause of justice, when the 2nd defendant was served with process in these proceedings on 2/5/2024 at 2.30pm, it immediately moved the monies held in the escrow account at 5.07pm allegedly to offset the loan.

16. The 1st defendant submitted that neither the Offer Letter, Charge nor Debenture stipulated that the loan repayments would be made from the trading activities of the plaintiff. That the Charge document was clear that the 1st defendant had the right to receive the insurance funds and apply the same to reduce the plaintiff's debt. That its interest in the insurance money was that of a first loss payee and had a priority claim to the compensation.

17. That based on the Charge and Debenture instruments, the insurance money formed part of the securities held by the 1st defendant. Mr. Chacha Odero, Learned Counsel for the 1st defendant submitted that as at the date of the fire, if I & M Bank was to realize its securities, it was to get both the assets and the money as 1st loss payee. That the endorsed policy covered the period October, 2021 to September, 2022.

18. On irreparable injury, it was submitted that any loss or injury suffered by the plaintiff could be quantified and thus remedied by an award of damages. That the utilization of compensation funds was at the heart of the dispute and thus releasing the same would amount to giving a final order.

19. Mr. Kiplangat, Learned Counsel for the 2nd defendant supported Mr. Chacha's submissions that the insurance compensation for any loss was submitted for the 2nd defendant to be paid which was entitled to receive and utilize the same. That the 2nd defendant was a first loss payee on the insurance money and that prima facie, it had an exclusive and priority right under the insurance policy. That the plaintiff's access to the compensation money was erroneous and could not be used to rewrite the lenders right as a first loss payee.

20. On irreparable injury, it was submitted that the defendants were reputable financial institutions capable of repaying the damages sought by the plaintiff. That the appointment of an administrator was not a risk of irreparable harm and that the balance of convenience lied in favour of the 2nd defendant

21. I have considered the pleadings and submissions by Learned Counsel. The issue for determination is whether a case has been made for the grant of the orders sought. This is an application for interlocutory prohibitory and mandatory injunction.

22. The principles applicable for the grant of orders of temporary injunction were settled in *Giella v Cassman Brown* (1973) EA 358. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* CA No 77 of 2012 (2014) eKLR where the Court of Appeal held that: -

> "In an interlocutory injunction application, the applicant has to satisfy the triple requirements to, a) establishes his case only at a *prima facie* level, b) demonstrates irreparable injury if a temporary injunction is not granted and c) ally any doubts as to b), by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially".

23. It is undisputed that the plaintiff and the defendants are in a contractual relationship where the defendants advanced facilities to the plaintiff. The facilities were provided as a way of takeover of part of the plaintiff's facility with I&M Bank. The said facilities were secured by a first legal charge over the suit property and debentures over the plaintiff's assets. The plaintiff moved the Court seeking to have the defendants restrained from calling on the securities and disposing the suit property.

24. It was the plaintiff's case that at the time the parties executed the securities, the factory had caught fire damaging 87% thereof. That during the negotiation stage, the defendants were well aware of this fact but chose to continue with the transaction. The plaintiff contended that once the insurance company paid the compensation for the loss suffered, the defendants wrongly retained the money thereby making it difficult for the plaintiff to refurbish the factory. That the defendants' actions have stopped it from trading which has affected repayment of the loan facility.

25. On the other hand, the defendants contend that they were entitled to the insurance funds as it is supported by the security documents. The defendants' submissions are that they were a first loss payee and therefore had priority over the insurance funds.

26. In *Mrao Limited v First American Bank of Kenya and 2 others* (2003) KLR 125, a *prima facie* case was defined to mean a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is a standard which is higher than an arguable case.

27. In proving a *prima facie* case, the plaintiff has the burden of proving that it has a right that is likely to be or has been infringed by the defendants. In essence, the dispute before the Court concerns whether the defendants were justified in retaining the insurance compensation in an escrow account and pay themselves. The plaintiff has challenged this decision stating that this move has affected its ability to trade as the compensation funds were not being utilized for restoration of the destroyed factory.

28. The plaintiff had been advanced a facility by I&M Bank and the same was secured by a debenture and a charge over the suit property. The contract made it mandatory for the plaintiff to obtain a Fire Industrial All Risks Insurance cover.

29. It is not in dispute that a fire broke out on 15/6/2022 and the insurance Company paid the compensation monies in or about September, 2022. It is also not disputed that at the time the fire broke out, the plaintiff was still in negotiation with the defendants for a takeover of the facility offered by I&M Bank. Despite this position, the defendants proceeded to execute the securities and take over those facilities. Indeed, the payment or draw down was well after the loss and/or fire.

30. From the evidence on record, in terms of the correspondence between the parties prior to the execution of the facility documents, it is apparent that the issue of rebuilding the factory premises is not foreign and/or far-fetched. The plaintiff had via email communicated to the defendants its plan to put back the factory operational and be back in trading. It is through trading and resumption of business operations that the plaintiff was to be in a position to repay its financial obligations.

31. While at this stage the Court is not to determine the merits of the case, on a prima facie basis the plaintiff has demonstrated that there is need to halt the calling in of the securities until the dispute before the Court is settled at the trial. This is so because of the following: -

    a. the parties knew the extent the plaintiff was indebted to I&M Bank before taking over those facilities;

    b. the Letters of Offer by the 1st and 2nd defendant were executed on 20th and 26th May, 2022, respectively;

    c. as at that time, no insurance policy had been effected or endorsed in favour of the defendants. It was only agreed that the plaintiff's assets should be insured, that was prospective;

    d. the fire broke out on 15/6/2022 before the securities perfecting the take over facilities were executed. This meant that as at the time of take over of the facilities, the defendants well knew the state of the plaintiff's assets, that they were 87% damaged and that the factory was not in operation;

    e. with such knowledge, the defendants knew that without the compensation monies, the plaintiff would not be able to rebuild the factory, go back to trading then be able to repay the facilities.

32. Both defendants defend their position by citing the clauses in the Charge and Debenture documents. They also rely on various cases including, *Everhome Mortgage Company v The Charter Oak Fire Insurance Co. & 3 others* and *Westfield Insurance Co. v Carrel J Cubbage & 3 others* for the proposition that insurance compensation monies are payable to the person whose name is endorsed on the policy document. That they were both First Loss Payees.

33. The view the Court takes is that, that is the proper proposition of the law in a normal insurance transaction where a policy is issued and endorsed in the normal cause of business. The position here is different and that position of the law would be in applicable in this case for three reasons.

34. Firstly, as at the time the security documents were being executed and perfected on 24/6/2022, the loss had already attached. The fire broke out on 15/6/2022. Indeed, the clauses in those documents refer to future loss or damage and not on damage that had already attached and known to the parties. They were prospective and not retrospective.

35. Secondly, the alleged endorsements on the policy took place posthumously, on 2/8/2022 two months after the risk had already attached and the plaintiff was only undertaking negotiations for payment of the compensation. Thirdly, the plaintiff was allowed to access part of the compensation monies. The allegation that it was in error is not backed by any evidence.

36. The question is, since the securities were being entered into and perfected after the risk on the assets of the plaintiff had attached, was it in the contemplation of the parties that the defendants were entering the 'deal' for purposes of receiving the compensation monies and leave the plaintiff high and dry? There is nothing on record to show that to have been the intention. Sadly, however, that is what seems to have ended up to be going by the current state of affairs.

37. Another puzzling issue is, if the compensation money was meant to set off the loan why was the money put in an escrow account held by the defendants while the loans continued to make in huge interest? Why was the money not applied immediately it was received to offset the loans? The answer is clear. The money belonged to the plaintiff for restoring the destroyed assets. By holding the monies and not restoring the assets, the defendants were setting up the plaintiff to failure and default.

38. In this regard the court find that the plaintiff has established a prima facie case with a probability of success.

39. On the second limb, the plaintiff must demonstrate that it would suffer irreparable loss that cannot be compensated by damages. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the Court of Appeal held that: -

> "If the applicant establishes a prima facie case, that alone is not sufficient to grant an interlocutory injunction, the Court must further be satisfied that the injury the applicant will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between.
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> On the second factor, that the applicant must establish that he "might otherwise" suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

40. I have considered the documents on record and I note that the Debenture instruments make provisions for the appointment of an administrator. Administration is preferred where a company is deemed to be insolvent and unable to pay its debts.

41. In the present case, the plaintiff has laid blame on the defendants for being partly responsible for its troubles. I have already found that it was in the contemplation of the parties that in taking over the facilities from I&M Bank and extending fresh facilities, it was for the plaintiff to continue trading. That the defendants were not entering the transaction for purposes of receiving the compensation funds alone. The compensation funds should have been for the reconstruction or rebuilding of the destroyed assets.

42. The compensation funds having been withheld by the defendants, the plaintiff could not be able to proceed to trade. It came out that the trading was albeit on a low scale because of the destruction of the factory. That is but a sure route to default and which might lead to administration. I find that administration would be drastic and damages would not be an adequate remedy as the plaintiff would completely collapse.

43. The balance of convenience lies in allowing the *status quo* pending the determination of the suit.

44. The next issue is whether a case for a mandatory injunction has been made at this interlocutory stage. In *Malier Unissa Karim v Edward Oluoch Odumbe* (2015) eKLR, the Court of Appeal held: -

> " The test for granting a mandatory injunction is different from that enunciated in the *Giella v Cassman Brown* case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of *Kenya Breweries Ltd v Washington Okeyo* (2002) EA 109 had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 *Halsbury Laws of England* 4th Edition Paragraph 948 which states as follows: -
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> > 'A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application'".

45. In *Kenya Breweries Ltd & another v Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions: -

> " A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

46. In *Shariff Abdi Hassan v Nadhif Jama Adan* [2006] eKLR, it was held that: -

> " The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case."

47. The Court has been moved by the plaintiff to make mandatory orders directing the 1st defendant to release the sum of Kshs 214,015,279.35 and USD 2,159,032 by the 2nd defendant. The plaintiff's prayer for mandatory injunction is premised on the ground that the sums held by the defendants were

obtained via compensation paid out by APA Insurance Limited arising out of a Fire Industrial All Risks Insurance Policy.

48. From the cases I have cited above, a mandatory injunction is a reserve granted in special circumstances only and with great caution. The circumstances of this case are that the plaintiff remains indebted to the defendants based on the facilities advanced to it. On the other hand, there are monies held by the defendants which arise out of a compensation by the insurance company.

49. It is not in dispute that the insurance company had compensated the plaintiff for the damage on the buildings, plant machinery, stock in trade, furniture, fittings and office equipment. The defendants have laid claim in the insurance money arguing that they have a right of a first loss payee. The record is clear that the parties executed the security documents and had them perfected after the fire had destroyed 87% of the plaintiff's property.

50. The Court has already found that the security documents did not contemplate a situation where the risk had already attached. They were not to apply retrospectively but prospectively. The clauses in the security documentation are clear on that. Save for the letter of offer dated 14/9/2022 which was way after the securities had been perfected and even some Kshs 85M paid to the plaintiff, there was no reference whatsoever to the funds being paid to the defendants. It was about a future policy. The endorsement was after the fire. They contemplated a future loss. If the intention of the parties was that the insurance already effected covered the loss that had already attached, nothing would have been easier than to expressly state so in the recitals or in the clauses on insurance.

51. It is not in dispute that the plaintiff had accessed part of the monies as the same was required to reinstate the factory into operation to enable the plaintiff re-pay the facilities. If the compensation money was meant to repay the defendants as First Loss Payee as contended, why was the entire sum received not immediately applied to pay off the facilities? Why was it placed in an escrow account and be used to repay the facilities in bits and pieces while the facilities were incurring huge interest that was to outstrip the security? Why did the 2nd defendant wait until 2/5/2024, after it had been served with process in these proceedings to hurriedly attempt to "repay" itself from the escrow account! The monies had been lying idol for 2 years!

52. The answer to these questions is that the defendants well knew that the money was meant for the plaintiff to rebuild the factory but they wrongfully decided to withhold the same to the extreme detriment of the plaintiff. In order for the plaintiff to remain operational, it has to be restored to the position it was prior to the fire exposure. This is a position that is well shown to have been in the contemplation of the parties from the correspondence exchanged before perfecting the facilities. It cannot be that the defendants executed the transaction for the sole purpose of receiving and keeping the compensation funds.

53. Unless the factory is re-instated, the damage to be suffered would be permanent and grievous. It would not be equitable that the defendants executed the securities with the sole aim of taking unfair advantage of the plaintiff by receiving and keeping the compensation funds. The defendants would also stand a better chance if the property is restored as the value of the assets will increase. It is therefore in the interest of justice to allow the monies to be released for purposes of reconstruction and rebuilding.

54. Accordingly, I find that the plaintiff has made out a proper case for grant of the prayers sought and I allow the application in terms of prayer No 3 of the Motion.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE