



**KSC Investments Limited v African Banking Corporation Ltd (Commercial Case E031 of 2024)
[2024] KEHC 11463 (KLR) (Commercial and Tax) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E031 OF 2024
AA VISRAM, J
SEPTEMBER 25, 2024**

BETWEEN

KSC INVESTMENTS LIMITED PLAINTIFF

AND

AFRICAN BANKING CORPORATION LTD DEFENDANT

RULING

1. I have considered the Notice of Motion Application dated 26th January, 2024, together with affidavit in support sworn on even date; the supplementary affidavit sworn on 16th September, 2024; and the replying affidavit sworn on 9th February, 2024.
2. The Applicant submitted that parties entered into a binding contract for the redemption of the Applicant's property. He contended that some of the basic terms of the said agreement included terms to the effect that the property in question would be redeemed for the sum of Kshs. 22,000,000/= payable by way of a term loan, together with a lump sum payment of Kshs. 5,000,000/= approximately.
3. Counsel clarified that although the said agreement was never executed, the said terms were still binding on the Bank because the terms had been agreed to by way of various correspondence.
4. He submitted that the Bank had initially accepted his client's terms, and that a professional undertaking had been issued by his law firm in respect of the same. He explained, that the reason the agreement was never executed was because after the draft was circulated, various amendments and suggestions were proposed by each the parties, which were not acceptable, either to his client or to the Bank. Accordingly, no final agreement was ever executed, and the Bank moved to issue its statutory notices.



5. Counsel's contention was that despite no formal execution of an agreement between the parties as stated above, the various terms agreed to between the parties arising out of the previous correspondence remain binding, and the Bank may not carry out the proposed sale.
6. Counsel further argued that the sale value is below the market value set out in the Defendant's own valuation report, and the same is therefore illegal.
7. Based on the record before me, vide a letter of offer dated 21st November, 2012, the Applicant took out an overdraft facility with the Respondent in the sum of Kshs. 40,000,000/= and a term loan facility of Kshs. 31,500,000/=. The letter is attached at FNI of the Respondent's replying affidavit.
8. It is also evident that the said facility was secured by way of a charge dated 2nd December, 2014, and registered, and in favour of the Bank over the property, which is the subject matter of the application. Evidence of the same is found at FN 8 and FN 9 of the Respondent's replying affidavit.
9. Looking at the record, it appears that the Applicant stopped performing the contract sometime around the year 2020. At that time, the outstanding amount due to the Bank was approximately Kshs. 37,076,296/=.
10. Looking at the various exhibits and based on the submissions of counsel, it is evident that the parties attempted to reach a settlement but could not do so. The terms proposed at the time included an initial payment of approximately Kshs. 5,000,000/= as stated above, and thereafter, the payment of the balance of Kshs. 17,000,000/=, over a period of three years, as a term loan, and by way of quarterly payments. However, as stated above, this agreement never bore fruit, and was never executed for various reasons.
11. The evidence suggests that one of the reasons was because instead of making the said lump sum payment to the Bank, the Applicant opted to deposit the sum of Kshs. 5,198,400/= with its advocates instead, who in turn, issued a professional undertaking to pay over the said amount based on certain conditions, and upon execution of the agreement, which was still the subject of negotiation between the parties. As stated, the parties were however, unable to reach a mutual agreement, and no contract was ever executed. Accordingly, the said amount was never paid to the Bank.
12. To my mind, and based on the above, the debt remains owing to the Bank. Upon inquiry, Counsel for the Applicant admitted that he did not know what amount was due to the Bank from the borrower on a monthly basis. He explained that his client is the chargor and not the borrower, and therefore, he had no knowledge of the same.
13. Based on the record before me, it is evident that at some point over the years, the monthly repayment was approximately, Kshs. 375,000/= per month. Further, the record shows that the last full payment made by the borrower to the Bank was over three years ago, around May, 2021. Since then, the contract has not been performed by the borrower.
14. Considering the arguments above, I do not think that depositing money with one's advocates, or the issuance of a professional undertaking to pay the same conditioned upon a restructuring on satisfactory terms to the borrower, is the same as performing a contract. This is especially the case in circumstances where, to date, those sums have never been compiled with and the money has never been paid. The debt accordingly remains due to the Bank, and is long overdue.
15. As regards the relevant legal notices, I note from the replying affidavit and exhibits attached that the 90 days' Statutory Notice was served on 14th September, 2022. The same was issued by registered post,



- and a certificate of post is available on the record. Evidence of the same is found at Exhibit FN 19 and FN 20 of the replying affidavit.
16. Further, I note that the 40 - day Notice to Sell was issued to the Applicant and its Directors on 3rd February, 2024, by way of registered post to the address outlined in the charge. Evidence of the same is found at Exhibit FN 21 and FN 22 of the replying affidavit.
 17. Finally, the 45 days' Notice to Redeem under the Auctioneers rules was served on 20th September, 2023, by way of registered post. Evidence of the same is found at FN 21, FN 24, and FN 25 of the replying affidavit.
 18. I am satisfied in light of the above that the relevant notices were duly served on the Applicant, and that the Bank's statutory powers of sale crystalized in accordance with the law. It is also evident to me that the letter from the Bank to the Applicant dated 30th November, 2023, was on a "without prejudice" basis. The said wording appears at the top of the letter, and the legal ramifications are self-explanatory. The said letter also states that the terms contained therein were contingent on payment being made to the Bank within 14 days of receipt of the letter. No such payment was made within the 14-day time frame. The said letter is found at Exhibit FN 29 of the replying affidavit.
 19. Based on the evidence before me, I am not persuaded that the binding contract referred to and relied on by the Applicant existed between the parties. No contract was ever executed; and no payment was ever made. Only a professional undertaking was issued, and again, to date, the sum owing has never been paid because the parties could not agree on mutually acceptable terms of repayment.
 20. In the circumstances described above, I am of the view that the Bank is entitled to exercise the statutory powers available to it under the law. Finally, as regards the Applicant's submission relating to an allegation of undervaluation of the property, I am of the view that such a claim may still be pursued as a claim for, and remedy in damages. I do not think that the claim is in and of itself, a sufficient ground for the grant of an injunction.
 21. In the circumstances as described above, I find that the Applicant has not met the threshold for a grant of injunction as set out in *Giella v Cassman Brown* [1973] EA 358, namely:-
 - a. Establish his case only at a prima facie level,
 - b. Demonstrate irreparable injury that cannot be compensated by way of damages 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.
 22. In particular, I am satisfied that the Applicant has failed to make out a prima facie case under the first limb, in accordance with *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR, namely, "a case in 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 to call for an explanation or rebuttal from the latter."
 23. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. Having failed to pass the first hurdle, the Applicant may not leap frog to the next and that brings the matter to an end.
 24. Based on the reasons as set out above, I find that the application is without merit. The same is accordingly dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF SEPTEMBER 2024



ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

For the Plaintiff

For the Defendant

