



REPUBLIC OF KENYA



KENYA LAW
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**Hepa General Agencies Limited v NCBA Bank Kenya PLC (Commercial Suit E598 of 2024)
[2024] KEHC 16209 (KLR) (Commercial and Tax) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16209 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E598 OF 2024
FG MUGAMBI, J
DECEMBER 20, 2024**

BETWEEN

HEPA GENERAL AGENCIES LIMITED APPLICANT

AND

NCBA BANK KENYA PLC RESPONDENT

RULING

Introduction and Background

1. Before the court is an application dated 4th October 2024. It is brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 40 Rules 1 and 2 as well as Order 20 Rules 1 and 2 of the [Civil Procedure Rules](#).
2. The application is premised on the grounds on the face of it and supported by the affidavit of Henry Obanyi a director of the plaintiff Company sworn on even date. It seeks the following prayers:
 - i. Spent.
 - ii. Spent.
 - iii. That, this Honourable Court be pleased to issue an interlocutory injunction to restrain NCBA Bank PLC the Defendant/ Respondent herein and or any other third parties by themselves and or their servants, employees howsoever from selling or offering for sale whether by public auction or private treaty auctioning, transferring, charging, leasing, pledging or in any other way alienating or in any other manner whatsoever and howsoever interfering with the ownership, possession and or dealing with the Plaintiffs properties described as LR Number 37/242/9 Nairobi West and LR No.nairobi/ Block 72/1713 Langata pending the hearing of this suit.



- iv. That this Honourable Court be pleased to issue an order for accounts on the repayment of the loan facility granted to the Plaintiff by the Defendant pursuant to the letter of offer dated 27th August, 2019 showing the outstanding balances to date.
 - v. The costs of this application be provided for.
3. The applicant acknowledges having entered into a loan agreement with the respondent (hereinafter the Bank), to secure a facility of Kshs. 168,000,000/= in August 2019, secured by charges over LR Number 37/242/9 Nairobi West And LR No. Nairobi/block 72/1713 Langata (hereinafter the suit properties). It was a term of the agreement that the loan would be repaid at a monthly amount of Kshs. 2,500,000/= for 10 years.
 4. The applicant contends that despite having paid Kshs. 130,000,000/= out of the loan amount, the Bank unilaterally and illegally substantively changed the terms and conditions of the loan facility. By so doing, the Bank imposed unconscionable and illegal interest rates on the facility, in contravention with section 44A (1) and (2) of the Banking Act.
 5. The applicant further asserts that the Bank issued a fourteen (14)-day notice requiring the applicant to pay the full amount, failing which the properties would be advertised for sale. This was done despite the absence of a valuation for the suit properties. Additionally, the applicant raises concerns regarding the lack of service of statutory notices.
 6. The application is opposed by the Bank through a replying affidavit sworn by Jackson Kingori on 11th November 2024. The Bank confirms that since the loan was disbursed, the applicant had only paid a total of Kshs.23,651,746/= and not the amount of Kshs.130,000,000/= as alleged. This means that the applicant owes the Bank loan arrears of Kshs. 41,759,929.80 as at 18th October 2024.
 7. The Bank acknowledges having entered into an agreement for the applicant to dispose of one of the suit properties for purposes of offsetting the loan. The Bank further acknowledges that the applicant paid Kshs. 12,900,000/= only against the expected amount of Kshs. 22,000,000/= by end of September 2024.
 8. The Bank denies that it is in breach of the in duplum rule and further confirms having served the requisite legal notices on the applicant. It further confirms that the suit properties have been valued ahead of the intended sale.

Analysis and Determination

9. I have carefully considered the parties' pleadings and submissions. The main issue for determination is whether the applicant has met the threshold for granting the injunction orders they seek.
10. To succeed, the applicants must satisfy the conditions established in *Giella v Cassman Brown & Co Ltd*, [1973] EA 358. These conditions require the them to demonstrate a *prima facie* case with a probability of success, show that they would suffer irreparable harm that could not be adequately compensated by damages, and, if the court is in doubt, have the application determined on the balance of convenience.
11. These conditions are are applied as distinct, sequential hurdles which the applicant is expected to surmount sequentially. This means that if the applicant fails to establish a *prima facie* case, there is no need to consider irreparable harm or the balance of convenience (see *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, [2013] KECA 347 (KLR)).



12. As to what constitutes a *prima facie* case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others*, [2003] KECA 175 (KLR) explained as follows:

“A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is 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 as to call for an explanation or rebuttal from the latter.”
13. Turning to the dispute at hand, the facility of Kshs. 168,000,000/= is not contested. Under section 176 of the *Evidence Act*, entries in banker’s books are taken as *prima facie* evidence of the transactions and accounts recorded therein. The summary of the statement of accounts produced by the Bank at page 167 confirms that as at October 2024 the total overdue amount was Kshs. 41,751,929.80 with accrued interest of 22,626,525.14 and penalty interest of Kshs.5,032,706.27. This brings the total to Kshs. 69,411,161.21.
14. For the Bank to be in breach of the in duplum rule, as alleged by the applicant, it would need to have claimed or been paid an amount exceeding Kshs. 336,000,000/= (twice the principal amount advanced) or Kshs. 313,956,760/= (twice the principal amount due as of the time the loan became non-performing in July 2023). Even assuming, for the sake of argument, that the applicant had paid Kshs. 130,000,000/=, a fact that is contested, and subsequently paid the amount demanded by the Bank, the total amount paid would be Kshs. 199,411,161.21, which is well below the in duplum rule threshold. Accordingly, this argument fails.
15. It is also evident from the correspondence provided by the Bank that the applicant was aware of the default and had, on several occasions, requested the Bank to restructure the facility. The applicant’s prayer for an order for accounts is therefore moot, given that the applicant has already attached a certified true copy of the statements of account as annexure H1 to its supporting affidavit. This demonstrates that the applicant has been aware of the amounts outstanding.
16. Even if this were disputed, the Bank has also included, as part of their response, up-to-date statements of account spanning pages 167 to 272.
17. With regard to the service of statutory notices, I find that these were duly served. The notices are dated 2nd February 2022 (pages 283–285), 13th February 2023 (pages 286–291), and 6th June 2023 (pages 293–296), all contained in the respondent’s bundle. It is also incorrect to claim that there is no valuation of the suit properties. The Bank has provided two valuation reports, both dated 8th September 2023, prepared by Ms. Value Line Consulting Ltd. These reports can be found at pages 299–314 and pages 328–342 of the respondent’s bundle, covering the two suit properties.
18. Overall, after evaluating the evidence, I find that the applicants have failed to establish a *prima facie* case with a probability of success. Their claim for an injunction, therefore, fails at the first hurdle, in line with the dicta in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (*supra*).
19. Even if I were to consider the other conditions, I am not persuaded that the applicant would suffer irreparable harm. Any loss incurred can be adequately compensated by an award of damages. Furthermore, the applicant has not provided evidence to demonstrate that the Bank is incapable of paying such damages if awarded. Finally, the balance of convenience favors the Bank, as realizing its security at the earliest opportunity would help settle the default amount before the ballooning debt outruns the securities.



Disposition

20. Accordingly, the application dated 4th October 2024 is dismissed with costs. The interim orders issued are hereby discharged.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF DECEMBER 2024.

F. MUGAMBI

JUDGE

