



Parklane Properties Limited & another v Diamond Trust Bank Kenya Limited & another (Civil Case 10 of 2023) [2023] KEHC 17440 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17440 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 10 OF 2023
DKN MAGARE, J
APRIL 27, 2023**

BETWEEN

PARKLANE PROPERTIES LIMITED 1ST PLAINTIFF

VIEW POINT PROPERTIES LIMITED 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED 1ST DEFENDANT

BRANDED FINE FOODS LIMITED 2ND DEFENDANT

RULING

1. The Respondent filed a replying affidavit on March 1, 2023. The same is dated February 23, 2023 and sworn by Faith Ndonga, a Legal Manager of the 1st Respondent. According to her, the 1st Respondent advanced the borrower Kshs 129,937, 808. 79 and Usd 603, 446.79. This comprised of a continuing term loan of Kshs 34,154,174.83 and Kshs 34,161,133.19
Usd 301 576.99
Usd 301 869.80
Kshs 38,622.500.77
Kshs 20,000,000
Kshs 3,000,000 various letters of offer were attached.
2. The term loan had various repayment periods while the overdraft for Kshs 20,000,00 was payable on demand various rates of interest were reported to be argued on. It was a term that the said loans were secured by a legal charge over various properties among them the suit property being a leasehold property that is MN/1/7827 where there are various subdivisions being flat numbers 1, 6, 7, 8 and 9 on the 2 sub divisions numbers 8254 and 8256 in Section I Mainland North Mombasa. There were



also floating debentures of various amounts and guarantees by the plaintiffs and director IQBAL Valli Hussein and Alem Iqbal Valli.

3. It is the Respondent's view that there was default resulting in arrears of Kshs 37 770 639.78 and Usd 95,094.91 as at July 26, 2022. The bank issued statutory notices under Section 90(3) and the same were copied to the second defendant. Thereafter a forty day notice was issued and notices under Section 96 of the Land Act and thereafter instructions to auctioneers.
4. It is their view therefore that the loan is truly due and as at February 20, 2023 the total loan for all the facilities is Kshs 144,236,237. 42 and Usd 715,895.45. The result was overdrawn by a huge margin of 21 504 023. 35 and Usd 91,854.41 as at that date. Their view is that there are no restrictions in the guarantees and any other arrangement is internal to them and has no bearing to the bank. They rely on common directorship of the plaintiff and second defendant. They thus are of the view that the plaintiff has not met the requisite for grant of injunction.
5. The replying affidavit which I have painstakingly read is 362 pages long.
6. From annexure FN6 both directors of the plaintiffs above named are directors of the second defendant with IQBAL Valli Hussein having 49984 shares out of the possible 50,000 shares with the estate of Valli Hussein having 15 shares and Aleem Iqbal having 1 ordinary share.
7. The bank statement running from pages 332 to 361 is said to be evidence of indebtedness in both the Usd account (2 pages) and the Kenya Shilling account (198 pages). Annexed to the application is a deed of guarantee dated March 28, 2019 signed by Aleem and Iqbal Valli Hussein.
8. The guarantee was for Usd 972,655.34 and Kshs 85,485,485.03. Both parties executed the same guarantee. There are also various charges which I note are duly registered. Annexed to the application are various letters of offer duly signed signaling acceptance.
9. The notices of the auctioneers are said to be annexed as pages 360 and 363 unfortunately they are not annexed to the courts copy. However, the said notices are in pages 360 to page 363 of the plaintiffs list. In the notice dated July 26, 2022. The amount of arrears are indicated as 37 770 639.78 and Usd 95 094.91. The same require that default be rectified within 3 months of service of the notice. The 1st plaintiff was informed that the bank was to exercise its statutory power of sale and upon sale recover any balance from the first plaintiff.
10. The defendant's are also informed the addresses under Section 103 (3) of the Land Act that they have a right to apply to court for any relief stated in Section 104 (2) of the Land Act or the charge document. A similar letter is issued to the guarantors and the borrower.
11. On November 7, 2012, the 1st plaintiff was notified of default by the borrower and the amount outstanding was 168,000,000 and Usd 250,000. The plaintiffs were notified that statutory notices were issued and expired without rectifying default.

Plaintiffs submissions.

12. The main ground for the application is that there was no consideration for the guarantee and the advances. They also state that the statutory notices should be relied on as they did not comply with Section 90 of the Land Act. It is their view therefore that without an agreement between the two that is the plaintiff and the 2nd defendant the agreement is not binding for lack of consideration.
13. Their view is that the companies that gave guarantees have limited powers to borrow and do not have power to give guarantees. I will dismiss this ground upfront in that the legal actions are entirely within



the internal affairs of the companies and on the basis of the rule. *The Royal British Bank v Turquand (1856) 6E & B 327*. In that case Hervis CJ while giving the judgment of the court

“We may now take for granted that the dealing with these companies are not like other partnerships, and the parties dealing with them are bound to read the statute and deed of settlement and the party here, on reading the deed of settlement will find not a prohibition from borrowing but permission to do so on certain conditions.”

14. Finding that the authority may be made complete by a resolution, he would have a right to infer the fact of the resolution authorizing that which on the face of the document papers to be legitimately done.

15. This is in line with the holding in *Mahony v East Hollyford Mining Co* Lord Hatherly P granted the law thus”

“When there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the Articles of Association, those so dealing with them, externally are not to be affected by irregularities which may take place in the internal management of the company.”

16. Essentially therefore none is bound to interpret limitations within private organizations who has ostensible authority. In any case a general reading shows ostensible authority to do such things that may be necessary or incidental to attainment of their main objectives.

17. To be able to determine this case other than the factual matrices, it is a simple application for a temporary injunction. The leading authority in this aspect is *Giella v Cassman Brown (1973) EA 358*. The authority lays down the 3 pillars of grant of injunction that is: -

- a. The applicant must have a prima facie case.
- b. An injunction will not normally be granted unless the applicant might suffer irreparable loss of injury.
- c. In case of doubt, the balance of convenience will be relied on.

18. In the case of *Nguruman Limited v Jan Bonde Nielson & 2 Others* (2014) eKLR, the Court of Appeal, stated that the 3 conditions above are consequential and must be met one after another. Therefore, it is necessary before proceeding to the second and third to find out whether there is a prima facie case.

19. Prima facie case means that not a case that may necessarily succeed but it is not an idle case, the 1st respondent relied on the locus classicus case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* 2003 KLR 125.

20. For a prima facie case to be, it has to be such a case that if the evidence tendered is not rebutted, the court is more likely than not to grant the case. In cases of this nature, the applicant is under duty to show that there is a legal provision that has been breached and as a result the sale is likely to be unlawful.

21. However, much costs one is likely to incur it is irrelevant unless there is breach of a legal duty.

22. On the face of it there are legal charges registered and default has occurred. That is not denied or has it been seriously contested.



23. The first ground that is raised is that the second Defendant was not served with the notice indicating default. Whether or not the second defendant was served is a matter exclusively within the knowledge of the second defendant. Section 112 of the Evidence Act provides as follows:-

“ 112. Proof of special knowledge in civil proceedings

In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

24. Secondly, the issue of whether or not there has been default is established. There is no statutory period given for the issuance of a notice other than a statutory notice. I have seen the statutory notices issued to the parties. I am satisfied that on the face of it, statutory notices were issued. In the case of Juja Coffee Bank of Africa Limited v Juja Coffee Exporters Limited & 4 others [2018] eKLR, the Court of Appeal, stated as follows: -

“ 28. Wemay also reiterate what this court stated in the case of John Nduati Kariuki t/a Jobester Merchants v National Bank of Kenya Ltd [2006] eKLR that:-

“The applicant may well in due course make out a case to challenge the calculations of his indebtedness to the bank. He may or may not be successful. The legal issue however is whether the dispute on the outstanding loan can scuttle the exercise by a chargee of its power of sale. On that legal proposition this Court has expressed itself before and we need only refer to JL Lavuna & others v Civil Servants Housing Co Ltd & Another – Civil Appl No NAI 14/95 where Kwach JA stated:-

“I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. The legal position on this point is to be found in Halsbury's Laws of England, Volume 32, 4th edition at paragraph 7255:

“725 When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless,



on the terms of the mortgage, the claim is excessive”

The Court observed in the process, that 'a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it.' And so it is in this case.

25. The second aspect is whether the notice itself is in fact strict compliance with section 90 of the [Land Act](#). The said section provides as follows: -

“Remedies of a chargee. 90. (1)

“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be. (2) The notice required by subsection (1) shall adequately inform the recipient of the following matters— (a) the nature and extent of the default by the chargor; (b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed; (c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified; (d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and (e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.”

26. The obligation to issue a statutory notice is not to the borrower but to the chargee. There is no statutory provisions that has been breached section 96(1) gives the statutory power of sale and steps to be taken in case of default.

27. The other aspect that was deal with was as regards to the lack of consideration. Section 79 (4) creates the parameters to be made for the charge to be lawful ie.

a. Its subject to prohibition under any written law or the [Land Act](#). Any restriction is to be contained in the charge.

28. I have read the charge document and do not find any restriction on it. Issues whether there are agreements between the plaintiffs and second defendants and matters between them and do not affect the 1st defendant.

29. Whether there are issues or premises made in the offer letters are matters of determination between the addressee that is the 2nd defendant and the 1st defendant.

30. Though the offer was given which resulted in the charges being done the plaintiffs have no locus to enforce contract they are not party to.



31. The charge document is self-excruciating and self-explanatory. It does not require extrinsic evidence to explain it.
32. In the circumstances, I do not find any prima facie case. Having found that there's no prima facie case disclosed it is not necessary to find whether or not the injuries are irreparable or of the balance of convenience.
33. Consequently, the application is bereft of merit and is thus for dismissal.

Determination

- a. The application dated February 8, 2023 is unmeritorious and is consequently dismissed with cost of 30,000/=to the 1st defendant.
- b. The Court to issue directions on hearing after this Ruling.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH DAY OF APRIL, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

Harnish Shah for 1st Defendant/Respondent

Bryant for Plaintiff /Applicant

Owino for 2nd Defendant.

Court Assistant - Firdaus

