



**Erdeman Properties Limited v KCB Bank Limited (Commercial Case E208 of 2022)
[2023] KEHC 26954 (KLR) (Commercial and Tax) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E208 OF 2022
DO CHEPKWONY, J
DECEMBER 15, 2023**

BETWEEN

ERDEMAN PROPERTIES LIMITED PLAINTIFF

AND

KCB BANK LIMITED DEFENDANT

RULING

1. This ruling relates to the Plaintiff's/Applicant's Notice of Motion application dated 7th June, 2023, which substantively seeks an order of temporary injunction restraining the Defendant/Respondent, its agents, employees, servants or any other person or entity claiming through it from downgrading, interfering with the credit rating and listing or in anyway whatsoever, interfering with the Plaintiff's loan Account Number AA19239CV505 at the Defendant Bank pending the determination of the suit herein.
2. The grounds in support of the application as adduced on its face and reproduced in the affidavit of Zeyun Yang, the Applicant's Director sworn on 7th June, 2022 and further Affidavit of Mr. Zeyun sworn on 28th October, 2022 is that; sometimes between the year 2015 to 2018; the Plaintiff obtained credit facilities from the Respondent to a tune of KShs.1.84 Billion to finance its construction projects including the Great Wall Gardens 1 Project on LR No 27317/2 in Athi River. That the Plaintiff met all its loan repayment obligations until 12th March, 2020 when its operations dwindled due to disruptions by Covid-19 Pandemic and the Plaintiff was forced to close down its sites and the uptake of the apartments or units drastically slowed down. The parties engaged and agreed to restructure the loan facilities and to give and obtain moratoriums on principals and interest at various times of the existence of the fiduciary relationship noting the economic situation in the country and world over on the basis of mutual understanding between the parties.



3. The Plaintiff avers that it mistakenly advertised for sale and eventually sold One Hundred (100) units on LR No 27317/2 in Athi River of the Great Wall Gardens 1 Phase 11 which had been charged with the Defendant/Respondent but upon realizing the mistake it informed the Respondent of the same. Thereafter, all hell broke loose since the Defendant/Respondent completely refused to offer further facilities to the Plaintiff and continually resorted to sending a notification and threats to list the Plaintiff with the Credit Reference Bureaus. Eventually, the Respondent caused the Plaintiff/applicant to be enlisted with the Credit Reference Bureaus (CRB) thereby (sic) incapacitating the Plaintiff economically. Having been listed with the Credit Reference Bureaus (CRB), the Plaintiff/Applicant avers that it cannot procure loans from other financing facilities to finance its projects or even service the loans advanced by the Respondent hence the need for the orders being sought.
4. Finally, the Plaintiff/Applicant has averred that although the Respondent is statutorily mandated to provide its customers credit information, the Respondent is not under any mandate to provide such information where the information also relates to third parties. That in this case, there are third parties who have purchased units under the Plaintiff's project, and they are likely to be affected by the enlisting of Plaintiff with the Credit Reference Bureaus (CRB).
5. In opposing the application, the Respondent vide the Replying Affidavit of its Head Credit Support Unit, Oscar Obuna termed the application as an abuse of the court process. He has averred that the Plaintiff/Applicant has not disputed the loan facilities nor the fact that it had not honoured the repayment terms. That by the time the Respondent agreed to restructure the loan facilities by amalgamation, the outstanding loan amount stood at Kshs.1,787,747,355.84 as at 5th July, 2019. The deponent states the Plaintiff failed to service the loans in monthly instalments as agreed and pursuant to Regulation 2 of the Credit Reference Bureaus (CRB) Regulations, which enjoin the Respondent to notify the Credit Reference Bureaus (CRB) of an account unpaid for ninety (90) days, the Respondent forwarded the Applicant's information on the unpaid facilities. The deponent has added that had it not done so, it risks being sanctioned under Regulation 63(10) of the Credit Reference Bureaus (CRB) Regulations.
6. The Respondent has further averred that the Plaintiff/Applicant had breached the charge forming security to the facilities by selling part of the secured property without the Respondent's sanctioning. It therefore seeks the court to find the balance of convenience as tilting in its favour and proceed to dismiss the instant application.
7. The parties were directed to canvass the application by way of written submissions and as the record reflects, both parties filed their respective submissions with the Plaintiff/Applicant filing submissions dated 21st September, 2022 whilst the Respondent's submissions are dated 24th November, 2022. I have read through the said submissions and since they largely reflect the summary in the preceding paragraphs, I find no need of reproducing the same here but will endeavour to highlight the same in my analysis and determination of this application.

Analysis and Determination

8. In determining the Notice of Motion application dated 7th June, 2022, I have
9. carefully read through the grounds on its face and affidavits in support and in rebuttal thereof alongside the submissions filed by either party in support of the same. I find the issue for determination being whether a temporary injunction can issue herein.
10. This being an application for temporary injunction, the same is governed by the well-established principles initially well laid down in the case of *Giella v Cassman Brown & Co. Ltd* [1973] 358. Those



principles settling the law on temporary injunction have remained that; an Applicant seeking to get and be granted a temporary injunction must establish a prima facie case with a probability of success; must establish that he/she stands to suffer a loss irreparable by an award of damages if the injunction is refused and where the court is in doubt, it should balance the convenience between the parties.

11. The three pre-requisites must be established in a sequential manner but more importantly, the Applicant must established that prima facie case with probabilities of success which underscores the consideration of the other two conditions. The issue for consideration now is whether the Applicant has met the threshold for grant of injunction.
12. The first hurdle is for the Applicant to establish a prima facie case with a probability of success at trial. Our courts have nevertheless echoed that a *prima facie* case is a case in which on the material presented to the court or 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. A prima facie case is more than an arguable case and the former signifies a case capable of shifting the evidential burden as opposed to giving rising to evidential burden of proof.
13. In the present case, the Plaintiff/applicant submitted that it has established a prima facie case in that, it has at all material times serviced the facilities until it was disrupted by financial relics flowing from the effects occasioned by Covid-19. That the facilities and the projects to which the facilities were commissioned was generally for the public good and its listing with the Credit Reference Bureaus (CRB) not only sabotages its financial ability but also directly affects the innocent members of public who have purchased and or anticipate purchasing the units offered as security to the facilities.
14. The Respondent on the other hand, simply put it as, that the Applicant/Plaintiff accepted the facilities and the repayment terms therein but has failed to observe the said terms despite numerous accommodation. That the Respondent is not privy to any of the mentioned third parties and in any event, the Plaintiff failed to deposit the proceeds from the sale of the Units to an escrow account as previously agreed. Lastly, that in the forwarding the Plaintiff's information to the Credit Reference Bureaus (CRB) for listing, the Respondent merely executed a mandatory obligation imposed upon it by statute.
15. In view of the foregoing, I first wish to point out that it is not within the mandate of courts to rewrite contracts between parties in view of the hallowed legal maxim that parties are bound by the terms of their contract, unless coercion, fraud and undue influence are pleaded and proven. The relationship between the parties herein was established by the lending documents including the offer letters and charge documents securing the facilities offered. None of those documents envisage and or purport to cover the right of third parties who might purchase the Units in the properties offered by the Plaintiff/Applicant as security to the loans.
16. It is worth-noting that the Plaintiff/Applicant does not dispute that it is indebted to the Defendant and neither does it dispute the amounts owing to the Defendant. Perplexingly, the Plaintiff does not dispute that it defaulted in repayment of the loan amount that was advanced to it and neither has the Plaintiff stated what efforts it is making towards the repayment of the loan. It simply alleges that the enlisting of the Credit Reference Bureaus (CRB) has sabotaged it financially.
17. I have read and considered Regulation 63(4) of the Banking (Credit Reference Bureaus (CRB) Regulations, 2020 which provides that “a banking

institution or third party credit information provider shall submit and update all customer information to the bureau in accordance with these Regulations. If the institution fails or neglects to submit to the Credit Reference Bureaus (CRB) information of a person whose



credit information ought to be submitted to the bureaus, a penalty of upto Kshs.2,000,000/
= may be imposed under Regulation 63(10).

18. I agree with the Respondent that being a banking institution, it is under an obligation to share with the bureau information of its customers especially the defaulters. The Plaintiff does not dispute that it defaulted. In my humble opinion, the assertion that it has been financially sabotaged does not lie since the information which the Defendant/Respondent has shared is within the ambit of the provisions of the Banking (Credit Reference Bureaus (CRB) Regulations, 2020.
19. Consequently, this Court is not persuaded that the Plaintiff/Applicant has established a prima facie case with probability of success. Having failed the first test for the grant of an injunction, it would be an academic exercise to belabour on the other two requirements underpinning the grant of injunction having pointed out that the requirements should be established in a sequential manner.
20. In view of the foregoing discussion, I am afraid that the Plaintiff/Applicant's Notice of Motion dated 7th June, 2022 lacks merit and proceed to dismiss it with costs to the Defendant/Respondent.

It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 13TH DAY OF DECEMBER, 2023.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

ALFRED MABEYA

JUDGE

