



REPUBLIC OF KENYA



**Mumbu Holding Limited v Credit Bank Limited & 5 others (Civil Case E800 of 2021)
[2022] KEHC 139 (KLR) (Commercial and Tax) (28 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E800 OF 2021
DAS MAJANJA, J
FEBRUARY 28, 2022**

BETWEEN

MUMBU HOLDING LIMITED PLAINTIFF

AND

CREDIT BANK LIMITED 1ST DEFENDANT

SKYTOP TECHNOLOGY LIMITED 2ND DEFENDANT

KIMANI MICHUKI & COMPANY ADVOCATES 3RD DEFENDANT

GEOFFREY WEKESA ADVOCATE 4TH DEFENDANT

PANIEL MWAURA 5TH DEFENDANT

REAGENT AUCTIONEERS 6TH DEFENDANT

RULING

1. The Plaintiff (“the Company”) is the registered owner of two properties: LR No. 12948/134 and 12948/137 (“the suit properties”). Its case as set out in the Plaint dated 16th September 2021 is that the Company was under the leadership of Mr JKM, who after the death of his wife, fell into depression. It accuses the 5th Defendant (“Paniel”) of transacting the Company business without any power and authority even though his interest was vested in the 2nd Defendant (“Skytop”) as a shareholder of the Company.
2. The Company alleges that in due course, it discovered that the suit properties had been charged to the 1st Defendant (“the Bank”) to secure advances to Skytop without its knowledge. It was therefore shocked to learn that the Bank was threatening to sell the suit properties when the Bank and the 6th



- Defendant (“the Auctioneers”) took steps to sell them following a visit by the Bank’s agents to conduct a valuation and advertisement of the suit properties for sale by public auction on 13th September 2021.
3. When the Company inquired from the Bank how the suit properties became charged to the Bank, it discovered an unsigned letter dated 20th March 2019 sent to the Bank purporting to offer the suit properties as security for the Bank to guarantee an overdraft facility of KES. 60,000,000.00 to Skytop. That by a letter dated 26th March 2019 on the Company’s letter head, the Company purported to forward the title deeds to the suit properties to the Bank.
 4. The Company accused the Bank of failing to act prudently in conducting due diligence as it ought to have known that the directors of the Company were JKM, EM, SM, BM and BM and that the Company was not an account holder with the Bank. It avers that under the Company’s Article of Association, the Company could only borrow for its own benefit and not for the benefit of a third party. Further, that the Bank accepted a charge document that was only signed by a single director yet there are four directors and the quorum for directors is three.
 5. The Company accuses the Skytop and the 3rd Defendant (“the Advocates”), who prepared the security documents, of fraud by charging the suit properties in favour of the Bank using forged, fake, counterfeit and phony documents, making documents without validity or authority, conspiring with third parties to register charges to the suit properties, presenting and uttering forged documents to third parties to procure credit and disregarding, abusing and violating its constitutional right to own property. The Company adds that at the time the suit properties were charged, JKM was suffering from depression and was under Paniel’s influence.
 6. The Company therefore seeks a declaration that the charges over the suit properties are fraudulent, null and void, an order compelling the Bank to refund all monies paid to them by the Company as repayment for the fraudulent loan facilities, an order of mandamus compelling the Bank to return the original title documents to it and a permanent injunction restraining the Bank from selling the suit properties in exercise of its statutory power of sale.
 7. In addition to the Complaint, the Company filed the Notice of Motion dated 16th September 2021 made, inter alia, under Order 40 rule 1 of the *Civil Procedure Rules* seeking, in effect, an injunction to restrain the Bank from exercising its statutory power of sale. The application is supported by the supporting and supplementary affidavits of BM sworn on 16th September 2021 and 18th November 2021 respectively. The application is opposed by the 3rd and 4th Defendants through the replying affidavit of Geoffrey Wekesa, an advocate in the firm of Kimani and Michuki Advocates, sworn on 1st November 2021. The 1st and 6th Defendants rely on the replying affidavit of the Bank’s Head of Legal, Wainaina Francis Ngaruiya, sworn on 1st November 2021. The parties filed written submissions in support of their respective grounds. The 2nd and 5th Defendants did not respond to the application hence the reference to Defendants is to the 1st, 3rd, 4th and 6th Defendants unless the context suggest otherwise.
 8. The grounds upon which the Company’s application is founded mirror the case set out in the Complaint which I have outlined above. What is apparent is that the Company claims that it did not have a full picture of the relationship between it, the Bank and Skytop and that is why the Defendants accused it of material non-disclosure. In their respective replying affidavits, the Defendants set out the relevant documents which I shall summarise.
 9. By a Letter of Offer dated 14th May 2018, the Company’s director, JKM was granted a facility of KES. 20,000,000.00 to be repaid within 3 months at an interest of 3% p.a. This facility was secured by individual and corporate guarantees and indemnities of JKM, Mbukabu Limited and the Company



in favour of the Bank for KES. 20,000,000.00 and a legal charge registered over property LR No. 209/8336/66 in the Company's name. The Company, by a board resolution dated 24th May 2018 resolved to approve the facility letter, corporate guarantees and legal charge. Further, the Company, through its director, JKM, applied to restructure the facility through the Letter of Offer dated 17th September 2018. The amount outstanding at the time was KES. 19,520,013.51 to be repaid over a 12 months in monthly instalments of KES. 1,7786,680,00 at an interest at 13% pa. According to the Bank, the outstanding amount as at 5th October 2021 is KES. 27,419,836.25 which continues to accrues interest and penalty for non-payment by Skytop.

10. The Bank states that upon request by Skytop, the Bank, through a Letter of Offer dated 3rd June 2019, advanced Skytop a temporary overdraft facility of KES. 60,000,000.00 for a period of 6 months at an interest of 13% pa. The facility was supported by a resolution of Skytop dated 4th July 2019 and secured by a legal charge over the suit properties, guarantees and indemnities from the directors of Skytop and the Company and corporate guarantees and indemnities from the Company and Skytop. The Bank states that the facility was granted to Skytop on account of the financial muscle and securities offered by the Company.
11. The Bank states that when Skytop defaulted, it issued a demand for payment. It states that it issued and sent to the Company the relevant statutory notices under the Land Act, valued the suit the properties, instructed the Auctioneer to issue a redemption notice and proceeded to advertise the suit properties for sale. In its view, the Company has not established any reason to injunct the sale of the suit properties.
12. The Advocates and the 4th Defendant oppose the application and deny the allegations of fraud. They support the Bank's case and urge that they acted on the Banks instructions and conducted due diligence to prepare and register and generally perfect all the security documents in relation to the suit properties. The 4th Defendant states that he was at all material times an employee of the Advocates and that there is no allegation against him and thus the suit against him should be struck out.
13. Turning to the substance of the application, the main issue for determination is whether the court should grant an injunction restraining the Bank from exercising its statutory power of sale. The principles guiding the court are those settled in *Giella v Cassman Brown [1973] EA 358*. In order to succeed, an applicant must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt, show that the balance of convenience is in its favour.
14. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR* the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown (Supra)* and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions. As to what constitutes a prima facie case, the Court of Appeal explained in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR*, that it is, "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."
15. As I have outlined above, the Company's case is largely based on fraud. The Company suggests that its controlling shareholder at the time material to this suit, JKM, was suffering from some form of mental disability. In order to support its case, it cited *Manan Jayendra Chuntibhai and Another v*



Jitendrakumar C. Patel and Another NRB ELC No. 23 of 2012 [2012] eKLR where the court granted an injunction on the basis that state of the mental health of the party would only be established after a full trial. While the court is not expected to conduct a mini-trial, there must some evidence from which the court may hold, on a prima facie basis, that the subject had some form of mental disability. In this case, there no evidence, medical or otherwise, that he was suffering from a mental disability or that his acts were coloured by such disability to the extent that they are null and void. It is also not clear from the pleadings how such disability is related to the activities of the Company and its relation to the Bank. It is also interesting to note that the Company's deponent, Ms. Mbuu does not disclose when the said JKM fell ill and thus unable to transact any business.

16. The Company appears to accuse Paniel of unduly influencing JKM committing the Company into burdensome agreements. This allegation is not pleaded with particularity and nothing in the Plaintiff or depositions points to or supports any allegation of undue influence. It also alleges a conspiracy with third parties to procure credit to charge the suit property but the particulars of such conspiracy, the names, the dates and manner in which the conspiracy was done is lacking.
17. The Company accused the Bank of using forged, fake, counterfeit and phony documents. This is a serious allegation to make and the Company is right to refer to *MWK v SKK and 5 others NRB ELC No. 32 of 2017 [2018] eKLR* where the court cited with approval the decision of the Court of Appeal for Eastern Africa in *R. G. Patel v Lalji Makanji [1957] EA 314* where it stated that, "Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities". It submits that it has raised substantial grounds for fraud that would require further investigation hence the court ought to grant an injunction to restrain the Bank from selling the suit properties.
18. The Bank exhibited all the documents to show how the Company became indebted to it as a result of various borrowing and evidenced by Letters of Offer, company resolutions, guarantees and charges. The Company has not shown how each of those documents is a forgery but has made generalized statements which cannot form the basis of a prima facie case.
19. The Company also contends that under its Memorandum of Object and Articles of Association, its borrowing powers were restricted under Clause 16 which reads that, "the Director may from time to time at their discretion raise or borrow any sum or sums of money for purposes of the company" In its view the Company could not therefore secure credit facilities for another entity. On its part, the Bank point to Clause 3(f) of the Memorandum of Objects which states that the Company may, "guarantee the performance of any contract or obligation and the payment of money of or by such persons or companies and generally to give guarantees and indemnities." In this case, I think the Company conflates the power to borrow which is not applicable in a case where a guarantee is being given to a third party and the object of the Company which allows it to issue guarantees or indemnities to any third parties. I do not think that this argument provides any basis to warrant the grant of an injunction.
20. At the end of the day, the Company's claims of fraud cannot stand in the fact of documents furnished by the Defendants clearly showing the nature of the transactions that the Company was involved in. There is nothing in law that prohibits a company from guaranteeing facilities to a third party entity. I hold that the lending transactions are supported by documents that are regular on their face and I cannot say at this juncture that the Company has established a prima facie case with a probability of success.
21. In order for the Bank to exercise its statutory power of sale, it must establish indebtedness and show that it has issued the requisite statutory notices. It is not in dispute that Skytop received money as



a result of the borrowing supported by the securities offered by the Company. The Statements of account produced by the Bank show that it is clearly indebted. As a result, the Bank issued and sent the 90-day statutory notice under section 90 of the Land Act dated 8th April 2020 by registered post to the Company. On 17th July 2020, the Bank sent the 40-day notice to sell under section 96(2) of the *Land Act*. These Notices were sent by registered post as evidenced by the Certificates of Posting. Thereafter, the Bank instructed Legend Valuers Limited to conduct a valuation of the suit properties to determine the open market value and forced sale valuation. In due cause, the Auctioneers issued the 45-day Redemption Notice dated 22nd July 2021 indicating that the suit property would be sold on 30th September 2021. All these facts were established in the replying affidavits and the Company did not controvert or contest them in the supplementary affidavit. Having failed to establish a prima facie case with a probability of success, the inquiry end there according to the dicta in the Nguruman Case (Supra).

22. There is also another reason I must decline to the injunction. The Company filed a similar case seeking the same reliefs against the Defendants in respect of the suit property in *HC COMM No. E727 of 2021 (Mumbu Holding Limited v Credit Bank Limited and 4 Others)*. This suit and the application for injunction filed therein are still pending and were not disclosed by the Company. Moreover, the Company depones without any equivocation that, “there is no other suit, and there have been no previous proceeding in any court between the Plaintiff and the Defendant herein over the subject.” This plea in the Plaint verified as correct in the verifying affidavit is clearly not true and correct. It is material non-disclosure.
23. For the reasons I have set out above, I now dismiss the Notice of Motion dated 16th September 2021 with costs to the Plaintiff. The interim orders in force are now discharged.

DATED AND DELIVERED AT NAIROBI THIS DAY 28TH OF FEBRUARY 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Lungwe instructed by Lihavi and Company Advocates for the Plaintiff.

Mr Gakinga instructed by Kimani and Michuki Advocates for the 1st, 3rd, 4th and 6th Defendants.

