



Hunkar Trading Company Limited & another v Family Bank Limited (Civil Case 841 of 2021) [2022] KEHC 515 (KLR) (Commercial and Tax) (19 May 2022) (Ruling)

Neutral citation: [2022] KEHC 515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 841 OF 2021
WA OKWANY, J
MAY 19, 2022**

BETWEEN

HUNKAR TRADING COMPANY LIMITED 1ST PLAINTIFF

HUNKY ENERGY LIMITED 2ND PLAINTIFF

AND

FAMILY BANK LIMITED DEFENDANT

RULING

1. This ruling is in respect to the application dated 1st October 2021 wherein the applicants/plaintiffs seek the following orders: -
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue a temporary injunction restraining the defendant either by or through his agents, employees and/or servants or any person claiming under or through him from pursuing any amount allegedly owed to it by the 1st Plaintiff.
 - d. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue an interim injunction restraining the defendant by himself or through his agents, employees and/or servants or any person claiming under or through him from selling by way of public auction, private treaty or otherwise, the 2nd Plaintiff's property LR No Unit number 1.3-59 Precinct No 3 BA being a portion of LR No 28867/1 or in any way interfering with the Property or any part thereof.



- e. That this Honorable Court be pleased to give any such other and/or further order(s) as it may deem fit.
 - f. That the costs of this Application be borne by the defendant.
2. The application is supported by the affidavit of the applicants' Director Mr Jackson Kariuki Kahungura and is based on, inter alia, the grounds that:-
- a. The 2nd Plaintiff is and has been the legal and registered owner of property known as LR No Unit number 1.3-59 Precint No 3 BA being a portion of LR No 28867/1 (hereinafter referred to as the "Property").
 - b. The 1st Plaintiff seeks to stop the Defendant from illegally disposing the 2nd Plaintiff's Property through the intended sale on 5th October 2021 by way of public auction.
 - c. The defendant's intended sale by way of public auction arises from a loan facility under Letter of Offer dated 24 January 2020 issued by the Defendant for a loan limit of Kshs. 69,000,000.00 (hereinafter referred to as the "Facility") which the Defendant structured as follows:
 - i. A Term Loan of a limit of Kshs. 40,000,000.00 to be utilized as working capital for a term of sixty (60) months.
 - ii. A Letter of Credit (LC) of a limit of Kshs. 20,000,000.00 to run for a period of ninety (90) days; and
 - iii. Revolving Invoice Discounting of a limit of Kshs. 9,000,000.00 to run for twelve (12) months.
 - d. This Letter of Offer provided that the 2nd Plaintiff would secure the Facility through the first legal charge for Kshs. 69,000,000.00 over the Property and the Property would be registered in favour of the Defendant. A corporate guarantee from the 2nd Plaintiff, the registered owner of the Property, was also required as security for the Facility to that effect.
 - e. Among other terms, the Letter of Offer provided that a Letter of Credit will run for a duration of ninety (90) days and the same would not mature until lapse of the said duration of time.
 - f. Sometime in April 2020, the 1st Plaintiff sought to purchase goods from certain suppliers but that the global outbreak of the Corona Virus (COVID-19) pandemic, the 1st plaintiff was unable to pay the purchase price for purchase of the goods after receiving proforma invoices.
 - g. The 1st plaintiff negotiated with the defendant for Letters of Credit to secure funding and pay the purchase price for the goods contained in the proforma invoices issued by Suppliers.
 - h. The Letters of Credit were granted sometime in July 2020 but that the same ought not to have matured until expiry of the duration stipulated which was to commence from the date of receipt of the goods from the Suppliers.
 - i. The defendant was not obliged to start debiting any of the 1st plaintiff's accounts maintained by the defendant for any amount unpaid under the Letters of Credit until on the maturity date.
 - k. However, the defendant without any colour of right, began to debit the 1st plaintiff's current account before the maturity date contrary to the terms of the Letters of Credit thereby making it difficult for the 1st plaintiff to clear the goods at the port thus leading to the accumulation of storage, shipping, rent, duties and taxes to the tune of Kshs. 11,960,961.00.



- l. The overdrawing of the 1st plaintiff's current account by the defendant before the goods for which the Letters of Credit related to were available for sale caused perpetual indebtedness to the 1st plaintiff. This has prejudiced the 1st Plaintiff's right to exercise the equity of redemption.
- m. The defendant has not offered any explanation why the amounts were debited to the 1st plaintiff's current account before maturity of the Letters of Credit, and this has caused great expense and loss to the 1st plaintiff.
- p. The wilful neglect of the defendant to heed to the terms of the Letters of Credit is what has led to an increase in the indebtedness of the 1st plaintiff through no fault of the 1st plaintiff causing the defendant to call in the Securities and proceed with the intended sale by auction.
- q. The defendant's act of proceeding to call in the securities is unfair and unlawful as the same was done contrary to the terms of credit negotiated between the 1st plaintiff and the defendant and as such, the defendant is in breach of the terms and conditions of the Letter of Credit which constitutes breach of the agreement.
- r. The outstanding sum of money overdrawn on the 1st plaintiff's current account as of 31st August 2021 stands at Kshs. 33,222,514.18. This amount would not have been overdrawn but for the defendant's wilful failure and or negligence to observe the terms of the Letter of Credit.
- s. As such, the Letters of Credit issued by the defendant should not have matured before 27 January 2021 which was the date on which the 90-day duration of the Letter of Credit would expire.
- t. Sometime on 6th August 2021, in addition to interest charges and ledger fees charged on the loan amount of Kshs. 40,000,000.00 disbursed to the 1st plaintiff on 24 February 2020 to loan account number 001SERL20055001, the defendant unconscionably charged an ad hoc charge of Kshs. 435,700.00 without any explanation as to how this amount was arrived at despite the 1st plaintiff making regular payments towards settling the principal loan amount and interest.
- u. This extra charge has continued to accrue interest leading to a loan balance of Kshs. 39,315,483.01 which the 1st Plaintiff would have continued to service and eventually off set had the goods been available for sale. However, due to failure of the defendant to observe the Terms and Conditions of the Letters of Credit as aforementioned, operations of the 1st Plaintiff were disrupted, and it was unable to pay for the same.
- v. The 1st plaintiff also negotiated for a facility for Conversion of Recalled Bank Guarantee and for Insurance Premium Finance with the defendant sometime on or around October 2020 under the Letter of Offer dated 2 October 2020 amounting to Kshs. 19,798,065.00.
- w. The Conversion of Recalled Bank Guarantee loan amount of Kshs. 12,922,120.00 was disbursed to loan account number 001SERL202800001 on 6 October 2020 and Insurance Premium Finance loan amount of Kshs. 6,875,945.00 was disbursed to loan account number 001PFFL202860001 on 12 October 2020.
- x. The 1st plaintiff made a repayment of Kshs. 1,338,616.72 and Kshs. 3,325,413.53 respectively though under difficult situations and the outstanding balance for loan account number 001SERL202800001 and loan account number 001PFFL202860001 as of 31 August 2021 was Kshs. 13,063,946.91 and Kshs.3,966,771.50 respectively.



- y. The 1st plaintiff would therefore have been able to service the loan of Kshs. 19,798,065.00 had the defendant not disrupted its operations by paying the Letters of Credit before the maturity date as the goods would have been available for sale.
- z. Due to the foregoing, the plaintiffs are apprehensive that the defendant will auction and or sell its property unlawfully given the fact that the defendant did not comply with the Terms and Conditions contained in the Letters of Credit which will occasion loss upon the 2nd Plaintiff.
 - a. As such, there exists an imminent threat that the defendant will carry out an illegal auction thereby prejudicing the 2nd Plaintiff's right to enjoy its equity of redemption over the property, which loss is irreparable.
 - b. The defendant has caught the 1st plaintiff by surprise with its intention to sell the Property by way of public auction on 5 October 2021 as advertised by the Defendant in the dailies, and the 1st plaintiff believes that the intended sale is manifestly illegal as it arises from the mistakes and failures of the defendant to observe the terms of the Letter of Offer dated 2nd February 2020 and Letters of Credit dated 27 July 2020.
 - c. Prior to the advertisement communicating the defendant's intention to sell the Property through the Auctioneers, the plaintiff has not received any explanation from the Defendant as to why the Letters of Credit matured before the maturity date as well as why it charged the ad hoc charge of Kshs. 435,700.00 on loan account number OOISERL200550001.
 - d. The fact that the defendant has proceeded to threaten to carry out the auction despite full knowledge that the defendant did not heed to the terms of the Letter of Offer and Letter of Credit is a clear demonstration of ill will and malice towards the Plaintiffs.
 - e. The defendant has without any colour of right proceeded to procure the services of Auctioneers on the property and is in the process of selling the property by way of public auction scheduled for 5 October 2021.
 - f. The plaintiffs have a strong case with a high probability of success and therefore the sale of the property through public auction should be stopped pending the determination of the dispute as to the right of redemption of the Property.
- 3. The respondent opposed the application through the replying affidavit of its Legal Officer Ms Sylvia Wambani who states that the Plaintiffs have not come to this Court with clean hands. She adds that the application is a mischievous and contemptuous attempt by the Plaintiffs to embroil the Defendant in unnecessary litigation with the sole aim of embarrassing it by bringing their otherwise respected business into disrepute. She avers that the invoices attached to the applicants' supporting affidavit were issued by an entity that is not a party to these proceedings and that it was not possible for the plaintiffs to apply for the letter of credit when they were unable to settle the purchase price in the Proforma invoices.
- 4. She avers that the correct letter of offer for the transaction is the one dated 12th June 2021, which shows that the purpose of the facility was to guarantee stock through a letter of credit and facilitate duty clearance for LPG accessories. She adds that the said facility issued under the letter of offer of 24th January 2020 is also in default accruing interest at default rates thus forcing the bank to issue the relevant statutory notices. She denies the allegation that the defendant issued 3 letters of credit subject of the letter of offer dated 24th January 2020 and states that the letters of credit were issued in compliance with the agreed terms of the letter of offer dated 12th June 2020.



5. She maintains that the term of the letters of credit was 90 days once opened and that the term had nothing to do with receipt of the goods from the suppliers.
6. She further avers that the plaintiff's account was debited in full compliance with the agreed terms of the letter of offer dated 12th June 2020 and the letters of credit issued, upon expiry of 90 days from the date it was opened. She observes that the Plaintiffs have failed to share any attempts at seeking the audience of the Defendant or seek its explanation for its actions even though they were aware of the terms of the instruments and the attendant consequences.
7. She states that the findings on the forensic accounting report cannot be held to be true so as to form a basis for granting orders of injunction as their veracity can only be tested during trial.
8. It is the defendant's case that any loss to be suffered by the plaintiffs can always be compensated by an award of damages and is thus not irreparable. She further states as follows: -
 - i. That the plaintiffs are more than 1000 days' in arrears which default the plaintiffs have acknowledged.
 - ii. That the Plaintiff has refused to make any payment towards the loan. It has failed to show good faith by refusing to abide by the agreed terms between the parties.
 - iii. That the sale of the suit property was always anticipated as a consequence of default.
 - iv. That the plaintiffs have not challenged the defendant's exercise of its statutory power of sale in so far as the statutory notices are concerned.
 - v. That all the necessary statutory notices were served upon the relevant parties and urges the court to reject any attempts to interfere in commercial instruments and transactions that are proper both in form and substance.
9. I have considered the application, the respondent's response and the parties' submissions. The main prayer in the application is for orders of injunction. The issues for determination are therefore whether the plaintiffs have made out a prima facie case to warrant the granting of orders of injunction.
10. The principles governing the granting of orders of injunction were stated in the case of *Giella v Cassman Brown Co Ltd* 1973 EA 358. Similarly, in the case of *Nguraman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal held that: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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.”



11. Prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others (2003) KLR 125* as follows:-

“So what is a prima facie case.....In civil cases it is a case 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 as to call for an explanation on rebuttal from the latter.”

12. The Plaintiffs concede that after successful negotiations, the Defendant granted the 1st Plaintiff three (3) Letters of Credit on 27 July 2020 for the benefit of three Suppliers. They contend that the said Letters ought not to have matured until the expiry of the stipulated period to commence from the date of receipt of the goods from the said suppliers according to the Bills of Lading. The plaintiffs maintain that the defendant was not obliged to start debiting any of the 1st plaintiff's accounts for any amount unpaid under the Letters of Credit until the maturity date. They contend that without any colour of right and contrary to the terms agreed under the Letters of Credit, the defendant started to debit the 1st Plaintiff's current account before the maturity date.
13. The plaintiffs' case is that the defendant's act of debiting the 1st plaintiff' current account before maturity of the Letters of Credit made it difficult for the 1st plaintiff to clear the goods at the port to enable sale of the goods and to pay for the goods before the maturity date leading to accumulation of storage, shipping, rent, duties and taxes to the tune of Kshs. 11,960,961.00 thus occasioning loss to the 1st plaintiff.
14. It is further, the plaintiffs' case that the overdrawing of the 1st Plaintiff's current account by the defendant before the goods for which the Letters of Credit related to were available for sale caused perpetual indebtedness to the 1st Plaintiff which has prejudiced the 1st Plaintiff's right to exercise the equity of redemption. They added that the neglect, by the Defendant, to heed to the terms of the Letters of Credit led to an increase in the indebtedness of the 1st Plaintiff thus causing the Defendant to call in the Securities and proceed with the intended sale by auction.
15. The defendant, on the other hand, maintained that the Plaintiffs have not established a prima facie case with probability of success. The defendant contended that the Plaintiffs' argument that the letters of credit were to mature after 90 days from the date of the bill of lading is unjustified as, on the face of the said letters, it is indicated that each opened letter of credit is valid for 90 days after they are opened or upon expiry. According to the defendant, a letter of credit in issued in favour of the seller and payment is made to the seller, in which case, the 90 days cannot run from the date of the bill of lading but from the date payment is made.
16. The defendant submitted that it complied with the terms of both the letter of offer of 12th June 2020 and the letters of credit as supported by the swift confirmation slips that it annexed to the replying affidavit. The defendant added that the breach of contract was on the part of the plaintiffs who failed to service the loan facility advanced to them despite having been informed of the default and the intended sale of the charged property.
17. From the above summary of the submissions made by the parties herein, it is clear that it is not disputed that the plaintiffs obtained a loan facility from the defendant which facility the plaintiffs have not serviced. The plaintiffs attribute their default to the defendant's alleged act of debiting the 1st Plaintiff' s current account before maturity of the Letters of Credit. According to the plaintiffs, the letters of credit were to mature after 90 days from the date of the bill of lading while the defendant argued that



the 90 days were to run from the date that the payment was made to the seller in favour of which the letter of credit was issued.

18. It is trite that law that parties to a contract are bound by the terms of their contract and that a court of law cannot rewrite an agreement between parties. In *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* (2014) eKLR it was stated:-

“It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd*. Civil Appeal No 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”

19. Further in the case of *John G Kamunyu & another v Safari 'M' Park Motors* (2013) eKLR where the plaintiff's argument was that the loan agreement entered into was unconscionable due to the usurious compounded monthly interest rates of 30%. The Court entered judgment in favour of the defendant for the loan advanced to the plaintiff together with interests at court rates. The Court stated:-

“This section section 44A *Banking Act*) provides a statutory application of the in duplum rule to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. I find that this rule is also applicable in the present case as it seeks to prevent lending contracts which provide usurious rates of interest. The rate of interest in the present case was therefore unconscionable to the extent that it provided for payment of interest that considerably exceeded the amount outstanding as the principal sum.”

20. In the present case, the parties had an agreement in the form of Letters of Credit which provided that monies were payable 90 days after the letters of credit opened or upon expiry. I note that on the face of the letter of offer, it was indicated that each opened letter of credit was valid for 90 days.
21. I note that the defendants have not demonstrated that they made any efforts to settle the debt. They remain in default and cannot at the same time seek the equitable remedy of injunction, they are at fault. I am not persuaded that they are entitled to the equitable remedy of injunction.
22. In sum, I find that the application is not merited and I dismiss it with costs to the defendant.

Dated, signed and delivered virtually at Nairobi this 19th day of May 2022.

W. A. OKWANY

JUDGE

In the presence of:-

Ms Muyaa for Rimui for Plaintiff.

Ms Kimathi for Onsare for Defendant.

Court Assistant- Sylvia

