Savannah Cement Limited v Kcb Bank Kenya Limited & another (Civil Case E174 of 2022) [2022] KEHC 16072 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 16072 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E174 OF 2022

WA OKWANY, J

NOVEMBER 24, 2022

BETWEEN

SAVANNAH CEMENT LIMITED ..... PLAINTIFF

AND

KCB BANK KENYA LIMITED ..... 1ST DEFENDANT

ABSA BANK KENYA PLC ..... 2ND DEFENDANT

RULING

1. The plaintiff filed the application dated May 20, 2022 seeking the following orders: -

    1) Spent

    2) Spent

    3) That pending the hearing of the suit herein, an order of temporary injunction be issued as against the defendants/ respondents jointly and severally, their agents, servants, representatives or any other person acting under their instructions, barring them from issuing a demand notice, advertising for sale, selling, appointing an administrator or liquidator, or in any other way interfering with the Plaintiffs quiet enjoyment of all its assets (including debentures) as charged by the Defendants/Respondents.

    4) That the costs of this application be provided for.

2. The application is supported by the affidavit of the plaintiff's director Mr Benson Sande Ndeta and is premised on the following grounds:-

    a. As regards a *prima facie* case with a probability of success

i. The plaintiff has been availed several facilities by the defendants separately.

ii. While doing business, the plaintiff has continued to repay its loans and honour its financial obligations as required by the charge instruments and debentures.

iii. While the plaintiff was in the process of clearing several loans as availed to it by the defendants, the defendants at the plaintiffs request proceeded to restructure the loan repayment terms.

iv. In restructuring the loan repayment terms, the defendants jointly and severally increased the total amount repayable by the plaintiff to astronomical amounts that breach the in duplum rule as provided under section 44A of the *Banking Act*.

v. Despite the plaintiffs request to be provided with an account statement for purpose of ascertaining how the balances reached the astronomical levels and to redeem the correct outstanding balance, the defendants jointly and severally have proceeded to threaten the plaintiff with the bank's recovery remedies.

vi. The defendants action has coerced the plaintiff to make a proposal of redeeming all the outstanding loans with Kenya Shillings Five Billion (kshs 5,000,000,000/-) (hereinafter the "Redemption amount"), which amount the defendants have neither rejected nor counteroffered but have immediately sought to exercise their bank recovery remedies.

vii. The intended bank recovery remedies will have various adverse effects of

a) Breaching the plaintiffs right as provided under section 44A of the *Banking Act*.

b) Breaching the plaintiffs right to redeem the outstanding actual and correct loan balances fairly and justly.

c) Unjustly enrich the defendants jointly and severally at the expense of the plaintiff and its shareholders.

viii. That the court has time and again held that when the equity of redemption is under threat, a *prima facie* case has been established and the court grants an injunction, thus in the case of *Bomet Teachers Training College Limited v Bank of Africa Limited & another* [2021] eKLR the court held:

In the final analysis, the evidence before this court *prima facie* shows that the applicant's equity of redemption is under threat of infringement. The said equity would be permanently defeated if this court declines to halt the sale of the charged property pending the determination of the suit. The balance of convenience therefore lies in favour of the applicant.

b. As regards irreparable loss that cannot be compensated by damages

ix. The plaintiff has various ongoing contract for the supply of cement to various projects as being undertaken by the national government, which would automatically be terminated without any opportunity of renewal were the defendants to be allowed to commence the bank recovery remedies.

x. The plaintiff is in the process of completing the funding of its Clinker Project which will allow it to get all the funds necessary to clear and pay all its

outstanding liabilities, of which if the bank recovery remedies were to be commenced and allowed to proceed, the plaintiff would lose the said funding and jeopardize the exercise of its right to redemption.

xi. The plaintiffs employees would lose their employment which loss of employment would have the adverse effect of ballooning the already boiling unemployment crisis in Kenya.

xii. The plaintiff would lose its valued assets including the machinery and land whose value cannot be recovered upon the exercise of the bank's recovery remedies.

xiii. The respondent would unjustly be enriched at the expense of the plaintiff and its shareholders, without the plaintiff being granted an opportunity to be heard.

c. As regards balance of convenience.

xiv. The plaintiff has already made a proposal to pay the balance outstanding, however seeks to be provided with the account statements for verification of the correct total amounts due.

xv. The allowing exercise of the bank recovery remedies would have the adverse effect of destroying and laying the last nail on the coffin of the plaintiff, yet it has the opportunity of exercising its equity right of redemption.

xvi. No prejudice shall be visited upon the defendants/respondent as the plaintiff is in operation and continues to discharge its financial obligations diligently, efficiently, and correctly.

xvii. The plaintiff is willing and able to comply with favourable conditions as set by court.

3. The 1st respondent opposed the application through the replying affidavit sworn by its head of special assets Mr Alfonse Kisilu who confirms that the 1st defendant extended loan facilities to the plaintiff but adds that the plaintiff defaulted on the interest payment by kshs 297,005,320.50 and penalty interest of kshs 13,518,511.25. He avers that the 1st defendant notified the plaintiff of the default by giving it 30 days' notice to regularize the position. He further states that the plaintiff admitted its default but argued that it was occasioned by cash constraints.

4. The 2nd defendant opposed the application through the replying affidavit of its head of business Ms Faith Mutuku who states that the plaintiff admitted that it had defaulted in its obligation to pay the debt and that the 2nd defendant held discussions with the 1st defendant with a view to taking over the debt. She further states that the plaintiff had agreed to be bound by the terms of the facility agreements which included comprehensive repayment schedules that indicated when the repayment was due and how much was to be paid.

5. The application was canvassed by written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders of injunction.

6. The principles governing the issuance of orders of injunction were set out in the celebrated case of *Giella vs Cassman Brown Co Ltd* (1971) EA 358 as follows:-

> " First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

7. The above principles, were restated in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others*, CA no 77 of 2012, as follows:-

> " 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. See *Kenya Commercial Finance Co. Ltd v Afraha Education Society* [2001] Vol 1 EA 86. If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).

8. What amounts to a *prima facie* case defined in the case of *Mrao Limited v First American Bank of Kenya and 2 Others* [2003] KLR 125, as follows: -

> " A *prima facie* case in a civil Case includes but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court; a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

9. I will now turn to consider if the present application meets the threshold set in the above cited cases. It was not disputed that the applicant secured a loan facility from the 1st and 2nd respondents and that it defaulted in repaying the said facilities. The facilities were secured by various properties belonging to the plaintiff. The applicant's case is that the defendants increased the amount of interest payable

while restructuring the loan repayments thus breaching the duplum rule. The plaintiff disputes the penalties and interest charged on the principal amount borrowed and argued that the amount had not been established.

10. My finding is that a *prima facie* case has not been established in view of the fact that the plaintiff does not dispute that it is indebted to the defendants. It is trite that parties to a contract are bound by the terms of their agreement and the court cannot rewrite the terms of the contract. This means that the issue of interest and penalties payable was agreed upon by the parties and is therefore governed by the terms of the contract. In *Christopher Ndolo & Another v CFC Stanbic Bank Limited* [2013] eKLR Mabeya J stated that:-

> " I have endeavoured to analyse the documents placed before me to be able to decipher how the parties intended to deal with each other. They indicated in the charge document that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be effected. Clauses 2 and 11 of the Charge must be given effect. I cannot re-write the agreement of the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it.

11. Similarly, Emukule J while citing, with approval, the decision of Ringera J, (as he then was) in the case of *Morris and Co Ltd v Kenya Commercial Bank Ltd & Others*[2003] 2 EA 605 held as follows:

> 130. "And this is what Ringera J, had this to say on the subject of interest rates in the case of *Morris and Co Ltd v Kenya Commercial Bank Ltd & Others* [2003]EA 605:
>
> As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be."

12. I also note that the amount due and owing from the plaintiff is quite substantial. In this regard, I find that the defendants are the parties on the receiving end as they are likely to suffer prejudice and irreparable loss if the orders sought herein are granted. I am guided by the decision in *Muriuki Wanjohi v Equity Building Society Limited & 2 others* [2006] eKLR where the court observed as follows:-

> " ... In my considered view, if the 1st and 2nd defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years..."

13. In the circumstances of this case, I find that the balance of balance of convenience tilts in favour of the respondents as the plaintiff did not state that the defendants will not be able to compensate it in damages should its case be successful.

14. In the upshot I find no merit in the application dated May 20, 2022 and I therefore dismiss it with costs to the defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF NOVEMBER 2022.

W A OKWANY

JUDGE

In the presence of: -

Mr Ochieng for plaintiff.

Mr Ogunde for 2nd defendant.

Mr Musyoka for 1st defendant

Court assistant- Sylvia