

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. E399 OF 2020

BETWEEN

MIDLAND INVESTMENTS (KSM) LIMITEDPLAINTIFF

AND

PRIME BANK LIMITED1ST DEFENDANT

MIDLAND HAULIERS LIMITED (In Administration)2ND DEFENDANT

MIDLAND EMPORIUM LIMITED3RD DEFENDANT

RULING

Introduction and Background

1. The Plaintiff has approached the Court by a Plaint accompanied by a Notice of Motion dated 1st October 2020 made under, amongst others, **sections 1A, 1B and 3A** of the **Civil Procedure Act, Order 40 Rules 1 and 2, Order 51 Rule 1 and 2** of the **Civil Procedure Rules** and **section 104** of the **Land Act** seeking the following orders:

1. Spent*

2. Spent*

3. *THAT pending the hearing and determination of this suit an order of injunction do issue restraining the 1st Defendant whether by itself, or through its agents, servants, employees and/or otherwise from exercising any rights whether as a Chargee, Creditor or howsoever over the Plaintiff's properties being L.R. No. 209/16791 in Nairobi and Title No. Kisumu Municipality/Block 6/22, or entering, remaining or in any way interfering with the Plaintiff's ownership and occupation of the said properties;*

4. *THAT an order do issue compelling the Defendants jointly and severally to give a proper and accurate account of all securities held by the 1st Defendant on the advances made to the 2nd and 3rd Defendants*

5. *THAT an order that the 1st Defendant do give an account of all monies advanced to the 2nd Defendant and the debits and credits made;*

6. *THAT an order do issue compelling the Defendants to give an account status of the fixed deposit Receipts held by the Guarantors with the 1st Defendant and a proper and accurate account of the application of the proceeds of the fixed deposits by the 1st Defendant;*

7. *Costs of the Application be provided;*

8. *Such further and other orders as to this Court may seem expedient to grant to maintain the Status Quo of the subject matter of the suit pending the hearing and determination of the matter.*

2. The application is supported by the affidavits of Jayesh P. Kotecha, a director of the Plaintiff, sworn on 1st October 2020, 11th December 2020 and 12th January 2021 respectively. It is opposed by the 1st and 2nd Defendants through the affidavits sworn on 23rd December 2020 and 10th November 2020 by the Assistant General Manager of the 1st Defendant ("the Bank") and Ponangipalli Venkata Ramana Rao, the 2nd Defendant's Administrator. The 3rd Defendant supported the application through the affidavit of Irene Muthama sworn on 12th January 2021.

3. The application was canvassed by way of written submissions with the parties advancing their respective positions.

The Plaintiff's Case

4. The Plaintiff's case is set out in the Plaint dated 1st October 2020 and the deposition in support of the application. The Plaintiff is prolix but I shall attempt to set out the core of the Plaintiff's case.

5. The Plaintiff is the registered proprietor of two properties; L.R. No. 209/16791 at Kyangombe Area of Nairobi and LR. No. Kisumu Municipality/Block 6/22 ("the suit properties"). It is not in dispute that the Plaintiff offered a Corporate Guarantee and the suit properties as securities in order to guarantee banking facilities by the Bank to the 2nd Defendant.

6. The Plaintiff asserts that it gave the securities on the understanding and express representation by the Bank and 2nd Defendant that the Bank would advance certain monies specified to the 2nd Defendant and that the Bank and the 2nd Defendant represented to it that the Bank held adequate fixed deposits, guarantees and securities from the 2nd and 3rd Defendants to cover the advances to the 2nd Defendant.

7. The gravamen of the Plaintiff's case is that the Bank did not make any advances to the 2nd Defendant and that it unlawfully and contrary to the **Banking Act, Central Bank of Kenya Act** and **Banking Regulations** transferred the 3rd Defendant's indebtedness to the 2nd Defendant without the approval and consent of the Plaintiff and the 2nd Defendant. The Bank purportedly advanced to the 3rd Defendant USD 1,500,000.00 and KES 40,000,000.00 in the year 2009 and that these amounts and accrued interest were never advanced to the 2nd Defendant. In the circumstances, the Plaintiff avers that the consideration precedent for the Plaintiff to create the Charge and Guarantee the 2nd Defendant's indebtedness to the Bank does not exist and as a consequence the Charge and Guarantee are null and void. It also claims that the Bank acted fraudulently and in bad faith by imposing liabilities on the 2nd Defendant without consideration.

8. The Plaintiff accuses the Bank of failing to account for the specific fixed deposits with accrued interest. The Plaintiff further claims that the Bank applied interest rates to the 3rd Defendant's account that were never agreed upon and imposed penalties thus making it impossible for it to know the level of the 2nd Defendant's alleged indebtedness to the Bank. It complains that the Bank has failed to correctly and accurately account to the Plaintiff, the 2nd Defendant and other guarantors for the sum credited to the 2nd Defendant.

9. The Plaintiff impugns the security documents. It complains that the Memorandum of Variation of Charges in respect of the suit properties dated 6th July 2015 prepared by the Bank's lawyers was done without the Directors' resolution or approval. It refers to the unexplained difference in the dates it is purported to have been executed by the Plaintiff, that is, on 24th September 2015 and/or 24th September 2014 and 30th September 2014 which is the date the Bank executed the document yet it is dated 6th July 2015. It complains that the Bank coerced the 2nd Defendant's Directors to create debentures and securities on account of a debt owed by the 3rd Defendant without the authority or consent of the Plaintiff or its directors.

10. The Plaintiff further complains that the Bank, with the intention of defrauding the Plaintiff and Guarantors, has also been colluding with its Advocates to try and sell its assets at a price below the forced sale value. For example, and as regards the Nairobi property which is valued at over KES 280,000,000.00 with a forced sale value of KES 250,000,000.00, the Bank has been fraudulently pushing the Plaintiff to accept KES. 180,000,000.00 as the sale price.

11. The Plaintiff reiterates that the Bank never advanced KES 70,000,000.00 as stated in the First Charge to the 2nd Defendant as this was an amount owed by the 3rd Defendant to the Bank and which the Bank transferred to the books of the 2nd Defendant without consideration. It adds that the further Charges created were meant to cover the interest accumulating over the years and the Defendants' fraudulent acts.

12. The Plaintiff claims that it is interested in knowing whether the Bank acted with diligence in converting overdraft facilities advanced to the 2nd Defendant and created loans without seeking the approval of the guarantors. It states that the Bank has not been candid in disclosing which of the various Companies was issued with the credit facilities and as such the realisation of the securities is only meant to cloud the illegal process by the Bank in handling the various accounts.

13. The Plaintiff avers that the debt has been non-performing for a period of over 8 years but the Bank has continued to apply interest contrary to the law. It claims that these actions of the Defendants have made it difficult for the Plaintiff to redeem the suit property as the Defendants have continuously doctored the accounts and altered the records as to make it impossible for the Plaintiff to know the true status of the indebtedness of the 2nd Defendant to the Bank or the 3rd Defendant to the other Defendants. It avers that the Bank had securities amounting to KES 195,946,579.15 when the 2nd Defendant took over the loan facilities from the 3rd Defendant yet the Bank has failed to explain what has happened to the securities.

14. It is on the basis that the Bank has failed to heed the Plaintiff's demand and notice of intention to sue that the Plaintiff now seeks the reliefs set out in the Plaint including an injunction restraining the Bank from exercising its statutory power of sale, an order for proper and accurate accounts, a status of the fixed deposits held by the Bank and an account of the application thereof.

The 2nd Defendant's Case

15. The Bank denies the Plaintiff's allegations and urges the court to dismiss the application. It Bank states that the Plaintiff, 2nd and 3rd Defendants have been its clients since 2007. It further states that the Plaintiff, 2nd and 3rd Defendants have a common director, Jayesh Kotecha, who has signed most of the communication with the Bank since establishment of their relationship.

16. The Bank states that these proceedings are an abuse of court process as there are pending proceedings between the parties dealing with the same issues namely; **Insolvency Notice E008 OF 2019 Re: Hauliers Limited** and **Insolvency Petition No. E012 of 2019 Re Midland Hauliers Limited** and that one of the orders sought include a, "*a temporary order of injunction do issue from this honorable court restraining the Respondent Bank named herein from by themselves, their servants, agents and/or employees or in any other way whatsoever*

disposing off any part of all those pieces of land known as L.R No, 209/16971, L.R No. Kisumu Municipality/Block 6/22, 3/30, 13/76 and 7/69 pending the hearing and determination of the proceedings herein”.

17. The Bank contends that the insolvency cases involve the suit properties and though the petition is filed by the 2nd Defendant, the Plaintiff is a party thereto and is aware of the issues in contention. It avers that in those proceedings, Nzioka J., issued an order on 30th July 2020 permitting the Administrator to obtain access to LR. No. 209/16791 and that if the orders sought herein are granted, they would effectively defeat the right of the Administrator to continue with his administration duties. The Bank submits that the 2nd Defendant is under Administration hence the primary purpose of these proceedings is to frustrate the Administrator.

18. In answer to the application, the Bank gave a background of the parties’ relationships. It states that the Plaintiff permitted the 2nd Defendant to undertake business on LR. No. 209/16791 hence the Plaintiff cannot now seek to restrain the use of the same suit property by the 2nd Defendant.

19. The Bank further contends that the Plaintiff, 2nd and 3rd Defendants are affiliated companies with common directors and shareholding. That they have had accounts or provided securities to facilitate each other's borrowings from the Bank as follows:

Company	Directors	Borrowings	Security held for respective borrowing
Midland Hauliers Ltd	<ul style="list-style-type: none"> · Jayesh Kotecha · Sweta Kotecha 	Overdrafts, Loans,	<ul style="list-style-type: none"> · <u>LR No, 209/16791 I.N.O the Plaintiff</u> · Charge over Title No. Kisumu Mun/7/69 I.N.O 3rd Defendant. · Charge over Title No. Kisumu Mun/13/76 I.N.O 3rd Defendant. · Charge over Title No.Kisumu Mun/3/30 I.N.O 3rd Defendant · <u>Charge over Title No. Kisumu Mun/6/22 I.N.O Plaintiff</u> · Cross Company Guarantees of Plaintiff and 3rd Defendant. · Directors/Personal Guarantees
Midland Emporium Ltd	<ul style="list-style-type: none"> · Jayesh Kotecha · Jagdish Kotecha 	Overdrafts, Loans etc	<ul style="list-style-type: none"> · Cross Company Guarantees of 1st and 3rd Defendants. · Charge over Title No. Kisumu Mun/3/30 I.N.O 3rd Defendant. · <u>Charge over Title No. Kisumu Mun/6/22 I.N.O Plaintiff</u> · Directors/Personal Guarantees. · Cross Company Guarantees of Plaintiff and 2nd Defendant.
Midland Investments (KSM) Ltd	<ul style="list-style-type: none"> · Jayesh Kotecha · Jagdish Kotecha 	Guarantor	<p>No borrowings at the moment</p> <p>Guarantor to the borrowings of the 2nd and 3rd Defendants</p>

20. The Bank avers that since the Plaintiff, 2nd and 3rd Defendant share common directors and shareholders, it is perplexing that the Plaintiff’s directors can pass a resolution to sue the 3rd Defendant where they are sole directors and shareholders. It submits that this suit cannot be sustained as the Plaintiff, the 2nd and 3rd Defendants are so intertwined by virtue of common directorship and shareholding and have issued cross-company guarantees to the Bank that it is not practically possible for any of them to sustain a suit against the other or as against the Bank.

21. The Bank further states that all the Letters of Offer dated 9th February 2010, 20th June 2011, 28th January 2012, 29th January 2013, 15th

May 2014, 9th December 2014 and 23rd January 2016 are executed by the Plaintiff, the 2nd and 3rd Defendants wherever applicable either as Principal Borrower, Guarantor or Chargee. Further, the common directors have issued personal guarantees with the intention of securing the borrowings within the Midland Group and it is therefore disingenuous for the Plaintiff to feign lack of knowledge or irregularity in the lending.

22. The Bank accuses the Plaintiff of misleading the court by alleging lack of knowledge of the facilities or the inter-company grant of facilities, guaranteeing each other and the resultant common securities. The Bank adds that it is the 2nd and 3rd Defendants, related Companies, which entered into an assignment in which the 3rd Defendant assigned its assets to the 2nd Defendant and that the assignment required the Bank's consent which the Bank provided and became part of the Deed of Assignment dated 10th May 2010. That pursuant to the Assignment, the 2nd Defendant sought and obtained facilities from the Bank whose purpose included "*Loan I & II To take over the liabilities of Midland Emporium Ltd (the 3rd Defendant herein) with the Lender*".

23. The Bank states that in the letter dated 15th October 2010, signed by Jayesh Kotecha, the 2nd Defendant requested the Bank to disburse the sum of USD 1,500,000.00 and credit the funds to the 3rd Defendant. This sum was further enhanced by USD 500,000.00 at the request of the 2nd Defendant and guarantors and disbursed as USD 2,000,000.00 on July 2012. The Bank restated that the Letters of Offer were executed by all the concerned parties and the securities that were to be offered included the suit properties. The Bank adds that at no time did the Plaintiff, the 2nd and 3rd Defendants raise any issue concerning the validity of the securities. That the Charges on the suit properties remained in place without any dispute and that the Memorandum of Variation of Charge was only created following the enactment of the **Land Act, 2012**. The Bank denies the allegation that there was no board resolution from the Plaintiff to create the Memorandum of Variation of Charges or that there is any irregularity in respect thereof.

24. The Bank states that it is not true it has not accounted for the other securities. It states through a letter dated 14th January 2016 signed by Jayesh Kotecha, the 2nd Defendant informed the Bank that the 2nd Defendant would be injecting KES 80,000,000.00 from the Director's personal fixed deposit to reduce the overdraft facility. By the letter dated 18th February 2016, Jayesh Kotecha, as guarantor of the 2nd and 3rd Defendants, instructed the Bank to uplift certain Fixed Deposits and credit a sum of KES 80,000,000.00 to the 2nd Defendant's account and renew the Balance, in line with the Letter of Offer dated 23rd January 2016.

25. The Bank contends that the 2nd Defendant is indebted to the Bank and that as at 30th June 2019, it owed the Bank, USD 6,677,609.89 and KES 6,826,253.74. It denies that the interest rates applied to the 2nd Defendant's accounts are contrary to the CBK Regulations or in breach of any law. The Bank states that it has not issued any statutory notice or done anything geared towards exercise of its statutory power of sale hence the grant of an injunction by the court would be in vain.

The 2nd Defendant's Case

26. The 2nd Defendant, through its Administrator, deponed that he was appointed by the Bank pursuant to the Debentures dated 11th November 2009, 2nd June 2011, 9th August 2012 and dated 6th July 2015. It supports the Bank's position that in view of the pending proceedings in **Insolvency Notice 008 OF 2019, Re: Midland Hauliers Limited** and **Insolvency Petition No. E 012 of 2019, Re: Midland Hauliers Limited**, these proceedings are an abuse of court process.

27. The Administrator submits that he has been permitted to remain in possession and control of the 2nd Defendant's business premises and that if the court grants the Plaintiff's application, it will effectively be ordering his removal from the 2nd Defendant's business premises and effectively stop him from conducting his duties under the **Insolvency Act, 2015**. The Administrator depones that the 2nd Defendant's directors have never permitted him to take possession of the 2nd Defendant's assets, accounts and books of accounts nor supplied him with the Statement of Affairs and have effectively violated the provisions of the **Insolvency Act, 2015** hence the Plaintiff and its directors should not be rewarded for undermining his statutory mandate by allowing the application.

The 3rd Defendant's Case

28. The 3rd Defendant admits that since 2003 to date it has sought and has been granted various loan facilities by the Bank to purchase vehicles and for trading as general wholesalers, transporters and exporters of various goods. It states that the Bank did not advance it any money and that it only reworked the debt outstanding from previous borrowing by the 3rd Defendant and converted the existing overdraft facilities and then started a new account to avoid showing that the account was non-performing. It contends that until 31st July 2012, the loan instalments were being debited from the 3rd Defendant's current account, despite the account not being serviced from the inception and it is indeed evident that during the entire period, the Bank was also charging monthly interest on the overdrawn amount on its current account which ultimately led to the balances of USD 1,193,185.15 on the loan account.

29. The 3rd Defendant adds that from the said records of 31st July 2012, despite the accounts being overdrawn, the 2nd Defendant nonetheless purported to take over the facilities from the 3rd Defendant notwithstanding that on the same date, the Bank had credited the account of the 2nd Defendant with USD 2,000,000.00 and KES. 52,000,000.00 despite the balance owing in the account being USD 1,193,185.15 and KES 31,199,920.00 though effectively clearing the loan account of the 3rd Defendant, but did not offer any explanation on the application of the subsequent amounts to the 2nd Defendant.

30. The 3rd Defendant insists that the entries done by the Bank on both the 2nd and 3rd Defendants accounts were mere book entries as no instalments were paid by the 3rd Defendant between April 2010 and 31st July 2012 and no amounts were disbursed to the 2nd Defendant. The 3rd Defendant adds that the amount of USD 2,000,000.00 and KES 52,000,000.00 indicated in the statement of account of the 3rd Defendant

was in regard to an earlier lending by the Bank to the 2nd Defendant and it was an outstanding loan from a non performing account and that the 3rd Defendant has several accounts with the Bank and that all its liabilities with the Bank have been secured by creating various Charges over its property.

31. The 3rd Defendant further states that Jayesh Kotecha ceased being its in 2014 and that the Bank has been dealing with the assets of the other parties irregularly and the Directors have even claimed an interest in the property of the 3rd Defendant. The 3rd Defendant states that on the 10th May 2010, the 2nd and 3rd Defendants entered into an arrangement where the 3rd Defendant assigned several trucks and trailers to the 2nd Defendant but that arrangement was not connected to the loan disbursements and book entries made by the Bank in July 2012. The 3rd Defendant adds that the Deed of Assignment did not address the advances made by the Bank to the 3rd Defendant and the 3rd Defendant has never seen any recording detailing how the arrangement was made between the 1st, 2nd and 3rd Defendant to transfer the liabilities of the 3rd Defendant in July 2012 to the 2nd Defendant. The 3rd Defendant supports the Plaintiff's assertion that the 2nd Defendant did not receive any funds from the Bank.

32. The 3rd Defendant affirms that the Plaintiff, 2nd and 3rd Defendants operated different accounts and were involved in different businesses. While the 3rd Defendant operated from Kisumu, the 2nd Defendant had operations in Mombasa, Kisumu and Nairobi. It asserts that their Directors were not common but distinct.

Analysis and Determination

33. I do not propose to rehash the parties' submissions as their respective positions, which I have highlighted above, encapsulate their arguments.

Whether the court should grant an interlocutory injunction

34. The substantial issue I am called upon to decide is whether I should grant an interlocutory injunction restraining the Bank from exercising its statutory power of sale. The applicable principles are common ground. In ***Giella v Cassman Brown [1973] EA 358***, it was held that for a plaintiff to succeed in obtaining an interlocutory injunction, it must demonstrate that it has a prima facie case with a probability of success, that it will suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted and if the court is in doubt regarding the nature of injury, determine the matter on a balance of convenience. More recently, 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 those conditions and added that they are to be considered as separate, distinct and logical hurdles a plaintiff is expected to surmount sequentially in order to succeed.

35. The Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others MSA CA Civil Appeal No. 39 of 2006 [2003] eKLR*** explained that a prima facie case 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." In determining this issue, it is important to recall, that the court is not required to make definitive findings of fact (see ***Celestine Ann King and 4 Others v Said Hassan Mwatsiro and 4 Others MSA Civil Appeal No. 89 of 2018 [2020] eKRL***). It was also observed in ***Nguruman Case (Supra)*** that:

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

36. The gravamen of the Plaintiff's case is that the Bank never granted any financial facilities to the 2nd Defendant and that it did not disburse any loan, overdraft facility or any amount to the 2nd Defendant which the Plaintiff could guarantee. It therefore contends that Guarantee and Charge created in favour of the Bank was therefore null and void for want of consideration. Further, the Plaintiff impugns the transfer of the 3rd Defendant's indebtedness by the Bank to the 2nd Defendant without its approval or consent. It submits that the Plaintiff, 2nd and 3rd Defendants are distinct legal entities, each with its shareholders and directors, in line with the hallowed decision of ***Salomon v Salomon & Co., Limited [1897] AC 22*** hence and as a result of the acts complained of, it is discharged from any liability as a guarantor.

37. To counter the contention that the Bank never disbursed any money to the 2nd Defendant, the Bank has produced correspondence from the 2nd Defendant signed by Jayesh Kotecha, who is also a director of the Plaintiff, to the Bank. For example, in a letter dated 6th February 2015 whose subject is, "Loan Facility queries" he refers, "to the Loaning facility provided to us as earlier scheduled" and requests to be given information on the duration of the loan Nos. 3, 4 and 6 including the interest rate, monthly instalments and the schedule of payment for the entire period for each loan. In another letter dated 22nd October 2015, Mr Kotecha requests the Bank to convert their "various loans and drafts" to USD as payment in KES was not sustainable. In the letter dated 29th December 2015, Mr Kotecha requests the Bank that "...the loans held by Midland Hauliers Ltd of accounts 700**347 and 700***939 be deducted from only one account...for the month of December 2015". In a letter dated 14th January 2016, the 2nd Defendant acknowledged the several facilities with the Bank; Loan 1 for USD 2,500,000, Loan 2 USD 514,000, Loan 3 Kshs. 100,000,000, Loan Kshs. 143,000,000 and Overdraft facility Kshs. 100,000,000 and proposed to inject KES 80,000,000.00 from the directors fixed deposits to reduce the overdraft, convert facilities to USD and increase the overdraft facility, extend the moratorium period and extend the period for loan repayment.

38. These letters, which were well known and indeed signed by Kotecha, represent clear and unequivocal admissions of advances and

indebtedness and serve to dispose of the argument that the Bank did not make any advances to the 2nd Defendant. The admissions are also buttressed by the several letters, among them the Letter of Offer dated 18th May 2017 in the Bank wrote to the 2nd Defendant in response to its request to restructure its banking facilities. That Letter of Offer which is signed by Kotecha, as a director of the 2nd Defendant, states in part that:

Your request has been given due consideration and we are pleased to inform you that your existing facilities in Kenya Shilling have been revised and you have been granted Loan facility VII of US\$.5,100,00 and a Loan facility VII US\$.397,500/- ... on the following terms, condition and securities.

39. The letter goes on to enumerate the various securities including the charges over the suit properties, the Corporate Guarantee issued by the Plaintiff along with the resolution together with the Memorandum of Variation of Charges. It is also worth noting the Letter of Offer was also executed by the MIDLAND HAULIERS (KSM) LIMITED who stated that, “WE AS CORPORATE GUARANTORS OF MIDLAND HAULIERS LIMITED CONFIRM THAT THE CONDITION STATED IN THE LETTER OF OFFER ... DATED 18TH MAY 2017 AS SET OUT IS ACCEPTABLE TO US AND FURTHER CONTINUE TO GUARANTEE THE PERFORMANCE OF MIDLAND HAULIERS OF ALL OBLIGATIONS HEREIN CONTAINED.” This statement is contained in all the other Letters of Offers issued by the Bank to the 2nd Defendant and puts to rest the Plaintiff’s argument that the securities are defective or that the terms of lending were varied without the Plaintiff’s authorization and consent. At every stage the Plaintiff was aware of and consented to variation of lending terms by the Bank to the 2nd Defendant on the basis of the securities it had provided.

40. While I agree with the Plaintiff that it is a separate legal entity from the 2nd and 3rd Defendants, the matter in issue concerns the parties’ business relationship. First, the companies have common directorships and shareholding. The CR 12 for the Plaintiff and 3rd Defendant issued by the Registrar of Companies in November 2020 show that that Jagdish Kotecha and Jayesh Kotecha are shareholders and directors of both companies. The various Letters of Offer from the Bank show that Jayesh Kotecha, was the driver of the relationship with the Bank as evidenced by the fact that he signed the Letters of Offer, executed securities with the other directors and signed correspondence to the Bank.

41. Second and more importantly, the 2nd and 3rd Defendant entered into a Deed of Assignment dated 10th May 2010 in which the 3rd Defendant assigned its assets to the 2nd Defendant and which the Bank assented to. Following the Deed of Assignment, the 2nd Defendant sought and continued to obtain facilities from the Bank. Following the Assignment, the 2nd Defendant did execute the Letter of Offer dated 20th June 2011 whose purpose was, inter alia, “To take over the liabilities of Midland Emporium Ltd with the Lender.” That Letter of Offer and terms contained therein were accepted by the Plaintiff as guarantor of the 2nd Defendant.

42. In my view, there is sufficient correspondence from the 2nd Defendant, Letters of Offer which all confirm, on a prima facie basis, that the Bank disbursed funds to the 2nd Defendant. There is also sufficient evidence that the 2nd Defendant took over the 3rd Defendant’s liabilities with the approval and consent of the Plaintiff. Indeed, there is no indication in the said correspondence that the Bank was mixing up the facilities of the 3rd Defendant with those of the 2nd Defendant so as to cause confusion to the 2nd Defendant as has been contended by the Plaintiff. Moreover, at no time did the Plaintiff allege that the securities offered by it were defective or invalid as alleged or at all. In fact, the securities were reiterated and accepted by the Plaintiff at each stage when it executed each Letter of Offer.

43. Since there is no dispute that the Plaintiff executed the Guarantee and Charge in favour of the Bank to secure facilities granted to the 2nd Defendant, it follows that the Bank has a chargee’s interest in the suit properties. Indebtedness is a condition precedent for the Bank to call in the guarantee and exercise its statutory power of sale. In this case, there is an express admission in **Milimani IP E012 of 2019** in the deposition by Jayesh Kotecha, sworn on 2nd May 2019, that the 2nd Defendant is indebted to an amount of KES 610,835,497.29 to various creditors and that, “it is also indebted to Prime Bank Limited (Secured Creditor) for a DISPUTED outstanding Loan of Kshs. 522,236,743.00 anchored upon various Charge Instruments and registered in favour of the Secured Creditor.” As I understand, the Plaintiff’s disputes the amount due on the basis of interest and penalties charged on the account and the failure to account for some fixed deposits. I hold that any complaint based on these issues would only affect the level of indebtedness and not the fact of indebtedness. Further, at no time during the history of the relationship did the Plaintiff complain about interest and penalties as it continued to approve renewal, variations and restructuring of facilities by executing the Letters of Offer.

44. It is now settled law that a chargee cannot be restrained from exercising its statutory power of sale merely on the basis of disputed accounts or interest (see **Mrao Limited v First American Bank of Kenya Limited and 2 Others (Supra)** and **Joseph Okoth Waudi v National Bank of Kenya CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR**). The Bank cannot also be restrained from calling for the repayment of the loans from the Plaintiff as a guarantor. In the light of the foregoing, I find that the Plaintiff has not demonstrated how the Bank has violated or infringed on its rights in relation to the suit properties. It has failed to establish a prima facie case with a probability of success. In **Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)**, the Court of Appeal held that once an applicant fails to establish a prima facie case with a probability of success, the inquiry comes to an end. I therefore decline to grant an injunction as prayed by the Plaintiff.

Existence of Pending Cases

45. The Bank and the Administrator brought to the attention of the court two insolvency cases: **Milimani IN No. 008 OF 2019** and **Milimani IP No. E 012 of 2019** relating to the 2nd Defendant. The Plaintiff did not disclose these cases in its pleading or deposition in support of the application. Its position is that the insolvency proceedings were irrelevant and not material to this case. In **Brink’s-Mat Ltd v Elcombe and others [1988] 3 ALL ER 188** cited with approval by the Court of Appeal in **Mary Wairimu Gikunju v Republic and 3 Others NYR CA Civil Appeal No. 275 of 2011 [2014] eKLR** it was held:

The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers [Emphasis mine]

46. It was not for the Plaintiff to decide whether those proceedings are material to this case or not. Where a party invokes the court's equitable jurisdiction, it has a duty to make full and frank disclosure and it was upon the court to decide the materiality of those facts. Be as it may, I have gone through the Petition in **Milimani IP No. E012 of 2019** and the same is not irrelevant as the Plaintiff claims. In view of the common shareholding and directorship and cross-securities between the three companies coupled by the 2nd Defendant's indebtedness which is secured and guaranteed by the Plaintiff, the fact of pending insolvency proceedings is a relevant consideration in determining whether or not to grant relief.

47. As the Bank has pointed out, the grant of an injunction in the manner prayed by the Plaintiff would affect the Administration of the 2nd Defendant. Further, the grant of a mandatory order compelling the Bank to render to it a true and proper account of the 2nd Defendant's charge account, which is more or less similar to one of the orders being sought by the Plaintiff herein, would benefit it. I therefore find and hold that the failure to disclose the pending insolvency proceeding constitutes non-disclosure of material facts and on this basis I would not grant the injunction.

Production of Accounts

48. The other issue I have to resolve is whether the court ought to order the Defendants to give a proper and accurate account of all securities held by the Bank on the advances made to the 2nd and 3rd Defendants. I note that the Bank has detailed and annexed to its deposition statements of account, furnished an account of all securities and fixed deposit receipts in respect of all the advances. **Section 176** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** creates a presumption in favour of the Bank as follows:

176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.

49. In light of the foregoing, I find that it is not necessary to make an order for accounts in light of the statements and documents furnished in the Bank's deposition. Whether the statements of account are correct will now be a matter for discovery and trial in due course. I therefore decline to make an order for accounts sought in Prayers 4, 5 and 6 of the application.

Conclusion and Disposition

50. For the reasons I have given above, I dismiss the Notice of Motion dated 1st October 2020 with costs to the 1st and 2nd Defendants. For the avoidance of doubt, any interim orders in place are hereby vacated.

DATED and DELIVERED at NAIROBI this 26th day of MARCH 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mogeni instructed by Mogeni and Company Advocates for the Plaintiff.

Mr Mwangi instructed by Machari-Mwangi and Njeru Advocates and for the 1st and 2nd Defendants.

Mr Anyoka instructed by Anyoka and Associates Advocates for the 3rd Defendant.