

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E081 OF 2020

BETWEEN

PROFESSIONAL CONSULTANTS LIMITED.....PLAINTIFF

AND

SBM BANK (KENYA) LIMITED.....DEFENDANT

RULING NO. 2

1. The application before the court is the Notice of Motion dated 1st February 2021 made under, inter alia, **Order 40 rules 1, 2 and 3** of the **Civil Procedure Rules**. The Plaintiff seeks to restrain the Defendant (“the Bank”) from selling its property, LR No. 13460/71 (“the suit property”) in exercise of its statutory power of sale pending the hearing and determination of the suit. The application is supported by the affidavit of its director, Jude Loveday, sworn on 1st February 2021 and the supplementary affidavit sworn on 10th March 2021. The application is opposed by the Bank through the replying and further affidavits of its Debt Recovery Officer, James Gakuo, sworn on 22nd February 2021 and 4th March 2021.

2. Since this is the second ruling in this matter, I will recap the facts and previous proceedings. The Bank is the successor of Fidelity Commercial Bank Limited (“Fidelity Bank”) and Chase Bank (Kenya) Limited (“Chase Bank”). By a letter of offer dated 21st October 2009, Chase Bank offered to the plaintiff and the plaintiff accepted an overdraft facility amounting to Kshs. 4,500,000.00 secured by the Plaintiff’s fixed deposit and directors guarantees. By a letter of offer dated 13th June 2015, Fidelity Bank offered to the plaintiff and the plaintiff accepted an overdraft facility of Kshs. 13,500,000.00 and a term loan of Kshs. 2,500,000.00 secured by a legal charge over the suit property.

3. The Plaintiff filed a Notice of Motion dated 23rd March 2020 made, inter alia, under **Order 40 rules 1, 2 and 3** of the **Civil Procedure Rules** seeking an injunction to restrain the Bank from selling the suit property by public auction in exercise of its statutory power of sale. The Bank opposed the application and after hearing both sides I rendered the ruling dated 17th August 2020 (“Ruling No. 1”) on the following terms:

- a. The defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as **LR NO. 13460/71 (Original No. 12460/7/3)** unless it issues a fresh statutory notice under **section 90** of the **Land Act, 2012**.
- b. The defendant shall bear the costs of the application.

4. In reaching the conclusion to restrain the Bank from exercising its statutory power of sale, I observed as follows:

[11] It is common ground that the facility granted by Chase Bank was contained in the letter of offer dated 21st October 2009. At Clause 8 of the letter the security for the facility was a lien over fixed deposits for Kshs. 5,000,000.00 in the name of the plaintiff supported by a letter of set off and a personal Guarantee and Indemnity executed by the directors; Jude Ian Wayne Loveday and George Omolo Odawa. The Charge over the suit property was executed in 2013 following the letter of offer dated 13th June 2015 issued by Fidelity Bank. At the time both banks were separate and there is no way the earlier facilities would be incorporated in the later security unless by agreement of the parties. They two agreements, having been issued by separate banks, always remained separate.

[12] I agree with the plaintiff the statutory notice dated 4th March 2020 is defective as it includes an amount not secured by the charge. In other words, it impedes the Plaintiff’s right to redeem the suit property by including an amount that is outside the confines of the charge. The charge only secured the overdraft and term loan granted by Fidelity Bank.

5. Following the ruling, the Bank issued a 90-day Statutory Notice dated 19th August 2020, a 40-day redemption notice dated 23rd November 2020 and a Notification of Sale dated 6th January 2021 by the Auctioneers all in respect of suit property thus precipitating the present application. The Plaintiff complains that the Statutory Notice dated 19th August 2020 and the subsequent notices contravene the express terms of Ruling No. 1. That the Statutory Notice does not comply with the mandatory provisions of **section 90** of the **Land Act** and that the intended auction is in violation of **section 97(2)** of the **Land Act** and **Auctioneers Rules**. The Plaintiff complains that the Bank is in breach of

section 33B of the *Banking Act* and also the *in duplum* rule in section 44A of the *Banking Act*.

6. In its response, the Bank contends that the statutory notice it issued complied with Ruling No. 1 in so far as it excludes all the amounts granted under the Chase Bank facility. It states the Plaintiff is still indebted and that it is entitled to exercise its statutory power of sale.

7. The parties relied on their depositions in support of their respective positions. The first question for resolution concerns whether the Statutory Notice dated 19th August 2020 complies with Ruling No. 1. The Statutory Notice refers to facilities granted by the letter of offer dated 13th June 2015 issued by Fidelity Bank under which the Plaintiff was offered and accepted credit facilities being; an Overdraft facility of a maximum of Kshs. 13.5 million and a Term Loan for a maximum principle amount of Kshs. 2.5 million. In the Statutory Notice dated 19th August 2020, the Bank demands Kshs. 32,257,324.26 made up as follows:

ACCOUNT NO.	FACILITIES	LOAN BALANCE
xxxx	Current Account	800,279.90
xxxx	Overdraft	28,343,381.90
xxxx	Term Loan	3,113,662.46
TOTAL		32,257,324.26

8. In the previous Statutory Notice dated 4th March 2019, which included the facilities granted by Chase Bank, the Bank demanded Kshs. 34,087,925.51 made up as follows:

ACCOUNT NO.	FACILITIES	LOAN BALANCE
xxxx	Overdraft	23,583,361.40
xxxx	Overdraft	7,053,820.15
xxxx	Term Loan	3,450,743.96
TOTAL		35,257,324.26

9. As I can see, the Statutory Notice dated 19th August 2020 includes a new account, No. (xxxx) for Kshs. 800,279.90 which was not there previously and which is not in tandem with the facilities under the Letter of Offer dated 13th June 2015. I would have expected that in compliance with Ruling No. 1, the fresh statutory notice would have contained two accounts. The Bank argues that amounts demanded in the Statutory Notices on accounts with facilities advanced by Fidelity Bank under various letters of offer and that the Charge is a continuing security securing all the facilities.

10. There are two Letters of Offer from Fidelity Bank predating the Letter of Offer dated 13th June 2015. The first is the Letter of Offer dated 22nd April 2009 for, “*Enhancement of Overdraft Facilities*,” enhancing the Overdraft from Kshs. 2.5 million to Kshs. 3.0 million. The second is the Letter of Offer dated 18th November 2011 for a, “*Revolving Overdraft Facility*” for Kshs. 8 million. If these two facilities were outstanding, nothing would have been easier than to state the amount due on each of them and include them in the Statutory Notice. In the first Statutory Notice dated 4th March 2019, nothing was said of previous facilities. In fact, in opposing the previous application, the bank did not allude to the earlier facilities.

11. At the end of the day, there is an unexplained account included in the Statutory Notice dated 19th August 2020. It cannot be wished away. I am constrained once again to restrain the Bank from proceeding to exercise its statutory power of sale on that basis.

12. The Plaintiff asserts that it has paid Kshs. 37,285,185.96 as against an advance of Kshs. 16 million in contravention of the *in duplum* rule contrary to section 44A of the *Banking Act*. This issue is *res judicata* as no new facts have arisen and in so far as I dealt with it as follows in Ruling No. 1;

[10] The Plaintiff has not denied that it is indebted to the Bank nor denied the fact that it received the statutory notice dated 4th March 2020. The plaintiff has raised the issue of interest rates but that issue alone would not entitle the Plaintiff to an injunction in view of the plaintiff’s admission of indebtedness (see **Fina Bank Limited v Ronal Limited [2001] 1 EA 54**).

13. However, and for completeness, the Plaintiff relied on the Bank’s correspondence dated 15th February 2019 to show that it has paid a total of Kshs. 37,285,185.96. In the said email the Bank informed the Plaintiff that he owed Kshs. 33,754,951.00 on the three accounts made up as follows:

	Chase Bank OD	Fidelity OD	Fidelity Loan
Principal Borrowed	(19,747,548.75)	(17,693,466.54)	(2,500,000.00)
Bank Charges	(81,544.63)	(1,124,457.00)	(50,000.00)
Interest	(8,062,314.69)	(15,319,999.54)	(387,043.02)
Penalties			(1,541,191.15)
Payments Made	20,915,186.42	10,787,426.82	1,050,000.00
Outstanding Balance	(6,976,221.65)	(23,350,496.26)	(3,428,234.17)

14. From the aforesaid email, the Plaintiff has paid a total of Kshs. 32,752,613.24 on the three accounts. The principal amount for under the Letter of Offer dated 13th June 2015, which is subject to the Charge, is Kshs. 17.5 million, and according to the Bank, the Plaintiff had paid Kshs. 11,837,426.82 on account of the principal only as at 15th February 2019, leaving a substantial balance on account the principal and interest. Whereas the Plaintiff states that it made substantial payments on both accounts, it does not state when it made the payments, on which account and what amount. I therefore reiterate that an injunction cannot be granted based on a dispute as to the amount. In this case, the Plaintiff is still indebted to the Bank.

15. In conclusion, I am satisfied the Statutory Notice dated 19th August 2021 is defective in so far as it includes an amount that is not supported by the Letter of Offer dated 13th June 2015 and the subject Charge.

16. Finally, and in order to avoid any further any further application on this matter, I direct the Bank to provide the Defendant with statement of all the facilities.

17. I allow the Notice of Motion dated 1st February 2021 on the following terms:

- a. The Defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as **LR NO. 13460/71 (Original No. 12460/7/3)** unless it issues a fresh statutory notice under **section 90** of the **Land Act, 2012**.
- b. The Defendant shall provide the plaintiff with statement of account in respect of each facility granted by the defendant (and its predecessors) to the plaintiff prior to issuing a fresh statutory notice.
- c. The costs of the application shall be in the cause.

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

D. S. MAJANJA

JUDGE

Ms Oduor instructed by Orego and Odhiambo Advocates for the Plaintiff.

Ms Ali instructed by Mburu Maina and Company Advocates for the Defendant.