



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

COMMERCIAL DIVISION

CIVIL SUIT NO. 1 OF 2020

KIGIO GROUP COMPANY LIMITED.....PLAINTIFF/APPLICANT

VS.

HOUSING FINANCE COMPANY LIMITED.....1ST DEFENDANT/ RESPONDENT

JM GIKONYO T/A GARAM INVESTMENTS.....2ND DEFENDANT/ RESPONDENT

RULING

1. I am called upon to determine the Notice of Motion application dated 15th January, 2020. That application is filed by **KIGIO GROUP COMPANY LIMITED** (hereinafter **Kigio**). Kigio seeks injunction pending the hearing and determination of this suit. Kigio by that injunction application seek to restrain **HOUSING FINANCE COMPANY LTD** (hereinafter **HFCK**) from disposing either by public auction or by private treaty the property L.R. No. 4953/45 and 46/IV (Thika Municipality Block 9/9 and 558) (hereinafter the suit property).

2. By this suit Kigio stated that HFCK made it an offer by letter dated 29th April, 2015 of a loan of Kshs. 520,000,000/= at an interest rate of 17% per annum. When Kigio executed that letter of offer it proceeded to instruct its contractor to move on site (the suit property) where Kigio intended to construct commercial/business centre. Kigio on or about 29th April, 2015 executed the charge instrument but it contends that HFCK up to today has withheld a copy of that charge instrument from Kigio. The condition of the loan was tailored to the progress of the project and HFCK was required to make payment directly to the contractor on presentation of the certificate of works completed or services rendered. It was also a term of the parties' agreement that the proceeds of the rental income of the suit properties was to be made by Kigio's tenants into HFCK's account. Kigio's case is that HFCK defaulted in making payment to the contractor from April 2015 and this led Kigio to have to look for other source of money in order to pay the contractor. In that regard Kigio stated that HFCK had failed to pay contractor's certificate NO. 8 and 9. Further that HFCK had continued to charge interest on Kigio's account for the months when no disbursement of the loan were made.

3. Kigio alleged HFCK had breached its contract and one of the ways Kigio particularised that breach was what it alleged was HFCK's failure to account for rental income collected by it and its interfering with Kigio's tenants.

4. Kigio confirmed having filed an action in the **Environment and Land Court (ELC)** being ELC Case No. 833 of 2017 Thika. This was however withdrawn by Kigio when parties met. That withdrawal was on the basis of agreement reached following an out of court meeting held on 24th January, 2018.

5. In Kigio's point of view was that HFCK unilaterally terminated its rent collecting agent, **Crystal Valuers Limited** and appointed **Etwon Property Consultant Limited** and that there was failure to account for rent collected. That ten days after changing its rent collecting agent, HFCK gave Kigio notice of its intention to dispose the charged property. Kigio stated that the said disposal of the charged property was in the absence of a valuation of the property.

6. Kigio particularised damage it had suffered as loss of rental income, legal fees for the withdrawn ELC case, Loss of reputation, loss credit "exposure" of high credit costs.

7. Kigio alleged fraud on the part of HFCK in failing to account for rent paid, failing to honour resolutions made in meeting of 24th January, 2018, failing to conduct a valuation of the property, taking control of Kigio's rental income and unilaterally hiring and firing property management companies.

8. Kigio by this suit quantified its claim against HFCK to a total amount of Kshs.191,749,800 plus general damages.

9. HFCK opposed the application and in that regard relied on the affidavit of Joseph Lule, its legal officer.

10. HFCK, by that affidavit, deponed that the loan agreement for the sum of Kshs.520 million was for a tenure of 30 months and after that period the same was to be converted into 15 year mortgage monthly loan. The rate of interest was 17% per annum and 16% on conversion of the long-term loan. The default interest rate was 19% per annum. That interest however was variable. The loan facility was secured by first ranking revolving charge of Kshs.520 million over the suit properties. The deponent confirmed that it was a term of the agreement that the loan was tailored to the progress of the project implementation and it was paid directly to the contractor on presentation of the certificate of works completed and services rendered. That Kigio, by the agreement, was required to inject additional equity of Kshs. 143,642 million. The deponent denied any breach of the agreement by HFCK. Further, it was deponed the loan was additionally secured by Kigio's directors providing director's guarantees and also providing a deed of assignment of the rental income over the suit property. The HFCK legal officer deponed that Kigio fell into arrears in its servicing of the loan which default was acknowledged by Kigio by letter dated 18th April, 2017 amongst others.

11. It was deponed that Kigio failure to remedy its default in servicing the loan led to HFCK to instruct the 2nd defendants, **J.M. GIKONYO T/A GARAM INVESTMENT**, an auctioneer to serve the necessary notices prior to advertising the suit property for sale by public auction. Further, HFCK confirmed to have instructed a valuer to conduct valuation of the suit property which valuation showed the suit property had an open market value of Kshs.720 million and a forced sale value of Kshs.540 million.

12. HFCK stated that in view of the deed of assignment of rent it had the right to appoint a property manager. That on appointing **ETWONS PROPERTY CONSULTANTS LTD**, it came to light that Kigio had instructed some tenants to pay rent to another property agent, contrary to the agreement.

13. In conclusion HFCK stated that Kigio having defaulted in repayment of its debt, it was empowered under the charge instrument to sell the charged property in view of that default, that the HFCK acted in accordance with the law and that Kigio can be compensated in damages in the event it succeeds in this case. HFCK therefore opposed the granting of injunction as sought.

ANALYSIS

14. I will begin by considering the well-trodden path of setting out the principle that need to be met by an applicant who seeks interlocutory injunction. Those tried and tested principles were articulated in the case **GIELLA V. CASSMAN BROWN [1973] E.A. 358** at p. 360 where it was stated that:-

*“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. (Emphasis added.)*

15. Kigio is expected to meet those three principle and it should surmount them sequentially. This was stated by the Court of Appeal whose decision was cited in the case **STARS & GARTER RESTAURANT & ANOTHER VS. NATIONAL BANK OF KENYA LIMITED (2019) eKLR** thus:-

*“In **NGURUMAN LIMITED V JAN BONDE NIELSEN & 2 OTHERS [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi) the Court of Appeal explained that all the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. I beg to quote the Court of Appeal at length:-***

“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) Ally 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.”***

16. The case of Kigio is that HFCK breached the Indicative Term Sheet for a loan. HFCK view is that the Indicative Term Sheet was not the offer for loan. On a *prima facie* basis I find what HFCK contends is in my view supported by the writing near the title of that document, the Indicative Term Sheet. It states:-

“The following indicative conditions have been prepared for the sole purpose of serving as a basis of discussion of the principal Housing Finance (the company HF) investment conditions if the company was to make a loan to Kigio Group Company Limited.” (underlining mine)

17. The above shows that Indicative Term Sheet was to be a basis of a subsequent loan agreement. HFCK did by offer dated 29th April, 2015 extend an offer of a loan to Kigio. That loan offer agreement, in my view, superseded the Indicative Term Sheet.

18. Further, although HFCK alluded to the Dead of Assignment of rent, which would be an answer to Kigio’s allegation that HFCK interfered with its tenant, Kigio did not contradict HFCK on that matter.

19. Most importantly, in my view, as I consider Kigio’s application is that Kigio and through its learned advocate admitted owing HFCK money. I beg to reproduce letters written by Kigio dated 1st September, 2017 and followed by another dated 18th April, 2017 as follows:-

“The Managing Director

Housing Finance Co.

P.O. Box 30088-00100

NAIROBI

Dear Sir,

REF: KIGIO GROUP CO MORTGAGE FACILITY (THIKA BUSINESS CENTRE)

On behalf of Kigio group Co I would like to thank you first and foremost for supporting the construction of our 11 floors building at Thika. We really appreciate your financial support towards the project.

This started due to delay in the bank disbursement last year which made the contractor to refuse to release the keys so that we could get tenants for the building.

We have had a meeting with your staff and agreed that we clear the interest arrears and then the bank can release the payment to the contractor.

We have a piece of land and we already have someone interested (a willing buyer) for 100 acres but the political uncertainty is causing customer delay in releasing the 20% agreed down payment.

We also got some American Company wanting to lease our conservancy at Naivasha but they are also delaying due to the political volatility.

We are requesting that we have directed all our payments from our buildings towards clearing the arrears but we are requesting the bank to kindly give our company four (4) months to be up to date.

Thanking you on behalf of the board.

Sincerely yours,

DR. A. WANYOIKE

TREASURER”

“The Credit Manager

Housing Finance Co. Ltd

P.O. Box

NAIROBI (underlining mine)

18/4/2017

Dear Sir,

RE: PAYMENT OF ARREARS FOR THIKA BUSINESS CENTRE

We have received communication on the above issue.

We wish to confirm the following:-

1. We are organizing to clear the arrears through our rental correction in the next one month.

2. As attached, we are selling our piece of land amounting to 100 acres with an offer price of Kshs.962,000/= within the next one month as per the attached documents.

Please bear with us as the delayed payment of the contractors from your caused a serious delay in sitting in tenants for the building.

Looking forward to your understanding on this matters.

Chairman

Cc: Kagio Group Co. Ltd" (underlining mine)

20. Kigio's advocate wrote a letter to HFCK's lawyer dated 9th January, 2020 as follows:-

"9th January, 2018

Triple Oklaw Advocates

5th Floor, Wing C. ACK Garden House,

1st Ngogn Avenue, Off Bishop Road

NAIROBI

Dear Sirs,

RE: HIGH COURT ELC NO. 833 OF 2017 – THIKA

KIGIO GROUP COMPANY LTD VS. HOUSING FINANCE LTD AND ANOTHER

We wish you a happy and prosperous 2018.

We further refer to the above matter whereof during the last court appearance on the 29/11/2017, the possibility of settling this matter out of court was breached between yourself and the undersigned.

Subsequent to the discussions our client's directors have held various meetings with your client's officials particularly Mr. Waweru and Mr. Mokaya the Managing Director and the Operations Director respectively.

Among issues agreed upon during the said meetings were as follows:-

a) Our client would pay an amount of Kshs.30,000,000/=

b) your client would settle the outstanding debt owing to the contractor in the amount of Kshs.140,000,000/= to allow the opening up of our client's building to facilitate leasing to interested tenants.

Our client would pay an amount of Kshs.5,000,000/= per month upon the building being opened by the contractor.

Your client would immediately release the following documents to our client:-

i) The formal charge

ii) A certificate printout of the statement of our client's loan account.

iii) The letter of offer

iv) The valuation conducted before our client's property was advertised for sale on November, 2017.

Other than its inability to seek advice, our client is impeded in no small measure by lack of the abovementioned documents in its

completion of the annual audit of its books.

Lack of the said documents is also threatening to put out client in a collision course with the Kenya Revenue Authority.

Ultimately, any decision reached between the parties must be on sound analysis of the matter at hand including the documents above-mentioned.

Kindly but urgently therefore, do forward to ourselves the documents in question to enable us advise our client in regard to its desire to settle the matter.

Yours faithfully,

Karuri Mwaura & Company

ADVOCATES

CC: Client”

21. The court will not ordinarily grant an injunction to restrain mortgagee from exercising its power of sale of a charged property where the applicant does not dispute the debt. This was re-stated in the case COS O SYSTEM SERVICES LTD & ANOTHER VS. SBM BANK LIMITED (2021) eKLR thus:-

“In this case, the issue of interest would only go to the extent of indebtedness. This principle is ingrained in our law and has been restated several times by our courts. In JOSEPH OKOTH WAUDI V NATIONAL BANK OF KENYA CA NRB Civil Appeal No. 77 of 2004 [2006] eKLR the Court of Appeal stated that:-

It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive. See HALSBURY’S LAWS OF ENGLAND Vol. 32, 4th Edition page 725 and LAVUNA & OTHERS VS. CIVIL SERVANTS HOUSING CO. LTD. & ANOTHER Civil Appeal Nairobi No. 14 of 1995 (unreported). MIDDLE EAST BANK (K) LTD VS. MILLIGAN PROPERTIES LTD, Civil Appeal No. 194 of 1998.” (unreported).

With the above in mind it becomes clear to me that Kigio has failed to show that it has a *prima facie* case with probability of success. In the case MRAO LTD V. FIRST AMERICAN BANK OF KENYA LTD & 2 OTHER [2003] eKLR, a *prima facie* case was defined as:-

“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 as to call for an explanation or rebuttal from the latter.”

22. Having failed to show *prima facie* case with probability of success this Court will not proceed to consider the other principles of granting injunction, because as stated before, those principles are considered sequentially. See the case of STARS & GARTER RESTAURANT & ANOTHER VS. NATIONAL BANK OF KENYA LIMITED (2019) eKLR (supra).

23. As I conclude my discussion, I need to remind Kigio that when it offered the suit property to HFCK as security for its loan, it equated the suit property to commodity for sale. See the case of BIO CORN PRODUCTS (EPZ) LTD V DIAMOND TRUST BANK LIMITED [2019] eKLR where it was stated:-

“In ANDREW MURIUKI WANJOHI V EQUITY BUILDING SOCIETY LTD & 2 OTHERS [2006] eKLR the court held:-

“By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor’s loss could be calculable, on the basis of the real market value of the said property.”

Section 99(4) of the Land Act provides:-

“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”

DISPOSITION

24. For reasons set out above the notice of motion dated 15th January, 2020 is dismissed with costs.

RULING DATED AND DELIVERED AT KIAMBU THIS 29TH DAY OF APRIL, 2021.

MARY KASANGO

JUDGE

Coram:

Court AssistantKevin

For the Plaintiff.....Mr. Mwaura

For the Defendant.....Mr. Kiche

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE