



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL CASE NO 35 OF 2018

WILLIAM ROMAN MC TOUGH.....PLAINTIFF

-VERSUS-

I & M BANK LIMITED..... DEFENDANT

RULING

1. In his Amended Notice of Motion dated 29th April 2021 and filed on 25th May 2021, the Plaintiff sought a temporary injunction to issue restraining the Defendant their servants and/or agents jointly and severally from advertising for sale, auctioning, selling, transferring, disposing, dealing and/ or interfering whatsoever with its suit property Kisumu Municipality/Block 7/152 pending the hearing and determination of this suit. The other prayers were spent.

2. On even date, the Plaintiff swore an Affidavit in support of his application. He averred that he was the registered proprietor of all that parcel of land known as Kisumu Municipality/Block 7/152 (hereinafter referred to as “the subject premises”) on which he constructed a hotel known as Scottish Tartan Hotel. He added that he developed the said premises through facilities offered by Giro Commercial Bank Limited, which facilities he averred, he had paid in full.

3. He further contended that in a rush to change and/ or transfer its ownership to I & M Bank Limited, Giro Commercial Bank Limited issued notifications of sale to all its customers who had taken loans with them without cross checking their books.

4. He contended that Giro Commercial Bank Limited advertised his subject premises without properly serving him with the statutory notice as a result of which he instituted the suit herein and that on 4th October 2017, he obtained a temporary order stopping the sale on the ground that its statutory power of sale had not arisen.

5. He added that when the matter came up on 9th October 2019, counsel for Giro Commercial Bank Limited informed the court that the Defendant had taken over the operations and business of Giro Commercial Bank Limited and sought for time to file a formal application to amend the pleadings to reflect the said change of ownership. The court directed that the said formal application be filed by 19th November 2019. He pointed out that this was not done whereupon the court referred the case to mediation to see if parties could resolve their dispute in light of the Ruling of the Court of 4th October, 2017.

6. It was his contention that parties had attended a number of mediation sessions and as they were still waiting for further sessions, the Defendant issued him with a defective notice to auction the suit property. He averred that the Defendant’s statutory power of sale under the charge created over the suit property had not arisen.

7. He was categorical that he had long completed his loan repayment and did not owe the Defendant any money. He was emphatic that in fact he over-paid the said loan by an extra Kshs 2, 408,000.87/-. He stated that the notification of sale issued to him by the Defendant was defective, premature and not in compliance with the provisions of the Land Act, 2012 and the Auctioneers Act. He added that the Defendant had not served him with any proper statutory notices under Section 96 of the Land Act.

8. He contended that the amounts being claimed by the Defendant were illegal in that Giro Commercial Bank Limited had applied exorbitant and illegal interest rates on his credit facilities, which interest rates were without notice or proper notice, harsh, oppressive and unconscionable. He added that the Defendant had also breached its duty under the agreement with him by failing to render a complete, true and accurate account of his accounts maintained by it. He stated that owing to all the aforesaid breaches, he was compelled to seek professional assistance from the Interest Rates Advisory Center (IRAC) and an Auditor.

9. He was apprehensive that he stood to suffer irreparable loss in that the subject premises was a hotel that he had developed over the years attracting goodwill. He stated that he was willing to abide by any pre-conditions the court would issue in order to grant the injunctive relief. He pleaded with court that his case was a proper case to grant orders sought and urged it to grant him the same.

10. In response to the said application, on 15th June 2021, Andrew Muchina, Legal Manager, I & M Bank swore the Replying Affidavit on behalf of the Defendant herein. The same was filed on even date.

11. The Defendant averred that ownership of Giro Commercial Bank's business including assets and liabilities were transferred to it as shown in the Kenya Gazette Notice No. 1301, Volume CXIX.

12. It contended that the Plaintiff benefited from several facilities between the 2009 and 2013 and had received a total of Kshs 80,500,000/= which had been secured by a Charge and Further Charges but that he had feigned ignorance of the various loans that were advanced to him. It added that it had sent him monthly statements and demand letters and he was thus well aware of his indebtedness to it. It was emphatic that he had deliberately withheld relevant material facts with a view to misleading the court into granting him an injunction he did not deserve.

13. It further averred that all charges, levies and interest debited to his account were in accordance with the contract of lending and the security documents signed between both parties and there was nothing illegal in charging them against his account. It was categorical that a dispute as to the accounts was not a sufficient ground to restrain a chargee from realising the charged property and/ or granting an injunction sought by a plaintiff.

14. It pointed out that in a Ruling that was delivered on 4th October 2017 in **Kisumu ELC Case No 229 of 2016**, the court found the Plaintiff to have been indebted to it and ordered it to re-issue the appropriate notices and proceed to realise the security according to the law. It averred that when the Court Annexed Mediation did not bear fruit, it sent him the three (3) months' Statutory Notice dated 21st September 2020 by registered mail indicating its intention to realise the subject premises. It added that it also furnished him with the mandatory forty (40) days' Notice to Sell that was dated 30th December 2020.

15. It argued that the said notices were proper and valid in law and it was thus entitled to realise its security to recover the substantial outstanding debt due and owing to it from the Plaintiff which as at 30th December 2020, stood at Kshs 65,590,080.29 together with further accrued interest thereon.

16. It further averred that the Plaintiff was not entitled to an order of injunction sought as he had not demonstrated that he had a *prima facie* case with any probability of success, or that he would suffer an irreparable injury and the balance of convenience favoured it because the monies he owed it were depositors funds entrusted to it and it had a duty to safeguard.

17. It added that temporary injunction previously granted to the Plaintiff was irregular and ought to be lifted. It was its case that the Plaintiff was seeking the court's assistance to compel the bank to re-negotiate or re-write the contract.

18. The Plaintiff's Written Submissions were dated 20th May 2021 and filed on 25th May 2021 while those of the Defendant were dated and filed on 18th June 2021. The Ruling herein is based on the said parties' Written Submissions which they relied upon in their entirety.

LEGAL ANALYSIS

19. Both parties were in agreement regarding the conditions that an applicant had to meet before being granted an order for an injunction. They both relied on the case of **Giella vs Cassman Brown (1979) EA 358** which set out the three limbs that must be demonstrated by a litigant seeking injunctive orders and the case of **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] eKLR** which defined the term *prima facie* case.

20. In addition, the Defendant placed reliance on the case of **Fina Bank Ltd vs Ronak Ltd [2001] 1 EA 54 (CAK)** in arguing that there was nothing uncontractual in the manner in which it applied interest on the Plaintiff's account. In the said case, it had been held that the contractual relationship between the parties therein could not be impeached because the exact rate or rates had not been specified.

21. It also relied on the case of **Bharmal Kanji Shah & Another vs Shah Depar Devji (1965) EA** where it was held that a court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there was a dispute as to the amount due under a mortgage.

22. It also referred this court to the case of **Rajnikantkhetshi Shah vs Habib Bank AG. Zurich [2016] eKLR** where the court therein held that the statutory notification of default and demand was *sine qua non* liability and basis for seeking payment of the debt.

23. The Plaintiff submitted he had demonstrated that he had a *prima facie* case. He pointed out the Defendant served him with a forty (40) days' Redemption Notice pursuant to Section 96(3)(h) of the Land Act. He argued that the said Notice was to be served upon a guarantor yet he was a Chargor and a Borrower. He contended that he ought to have been served with a Statutory Notice under Section 93(1) and for this reason, he termed the Defendant's notice as having been defective.

24. He further submitted that he had demonstrated that he had overpaid the loan amount by an extra Kshs 2, 408,000.87. He argued that the Defendant had failed to rebut that in its Replying Affidavit and hence its power of sale over the suit property had not arisen. He added that the Defendant had failed to give credit to sums he deposited with it and had subjected the loan account to varying penal interest rates without proper notice to him. He was categorical that the Defendant had failed to render a complete account of his respective accounts maintained by it and that on that score alone his application ought to be allowed.

25. On its part the Defendant submitted that although the Plaintiff had sought an equitable remedy, he had not approached the court with clean hands as he had not shown any attempts to pay the outstanding amount of Kshs 65,590,080.29 owed to it, which sum had continued to accrue interest.

26. It contended that the Plaintiff had not presented to court any evidence which would have *prima facie* shown that the amounts claimed by the Defendant were excessive or there was any illegality totally irreconcilable with the terms of the Charge.

27. It placed reliance on Section 84 of the Land Act and Section 44A of the Banking Act Cap 488 Laws of Kenya in arguing that there was nothing uncontractual in the manner in which it applied interest on the plaintiff's account. It was emphatic that it had charged interest as had been set out in the Letter of Offer and argued that the Audit Report by Nonkwe Adienge & Company CPA relied upon by the Plaintiff was grossly misconceived as it had computed interest using wrong rates of interest. It pointed out that in any event, the issues raised in the said Report had not been pleaded in the suit herein.

28. It added that the Ruling of 4th October 2017 had granted the Plaintiff an injunction for one (1) year and hence it was at liberty to re-issue the statutory notices. It submitted that it complied with Section 90 and 96 of the Land Act. It averred that the Plaintiff had not alleged nonservice of the said Statutory Notices and as such, it could not be said that it did anything contrary to the law which could clog its equity of redemption. It urged the court to dismiss the Plaintiff's application as the Plaintiff had not satisfied the threshold set in the case of **Giella vs Cassman** (Supra).

29. In the case of **Giella vs Cassman Brown** (Supra), an applicant seeking an order for an injunction ought to demonstrate the following:-

a. That it has a prima facie case;

b. That it will suffer irreparable harm for which damages would not be adequate if its application for interlocutory injunction was not granted;

c. That in case the court is in doubt, then it should grant an order for an interlocutory injunction on a balance of convenience.

30. As was correctly pointed out by the parties herein, the Plaintiff had sought and obtained an order for interlocutory injunction on 4th October 2017. The said order was granted pending the hearing and determination of the suit. The same was to be valid for twelve (12) months, during which time, the suit was to be heard and determined. It was not clear from the affidavit evidence that had been placed before this court why the suit was not heard during the said period.

31. Having said so, this court noted the Plaintiff did not file a Supplementary Affidavit to rebut the Defendant's assertions that he owed it a sum of 65,590,080.29 as at 30th December 2020. That notwithstanding, this court acknowledged that the Plaintiff had averred that it was the Defendant which owed him a sum of Kshs 2,408,000.87 being an overpayment of the loan.

32. Going back to the Ruling of 4th October 2017, this court noted that it had directed the following:-

a. That the suit proceeds for hearing and determination.

b. That the Defendant be at liberty to re-issue notices if the Plaintiff was found to have been in arrears.

33. As the court therein had found that the Plaintiff was **obviously in arrears** (emphasis court) but also indicated that the Defendant could issue the statutory notices **in case the Plaintiff was in arrears** (emphasis court) and at the same time directed that **the suit proceeds for hearing** (emphasis court), this court found itself in difficulties in determining if indeed, the court therein had found that the Plaintiff had established a *prima facie* case with probability of success.

34. Indeed, this court is of equal and competent jurisdiction as the court that issued the Ruling of 4th October 2017 and it could not therefore purport to sit on appeal of the orders of that court. It did, however, appear to this court that the court therein had not conclusively determined if the Plaintiff had arrears as there was an ambiguity in the way the direction was given.

35. Going further, the fact of the Defendant exercising its statutory power of sale in the event the Plaintiff was in arrears was not in contest. Indeed, as was held in the cases of **Bharmal Kanji Shah & Another vs Shah Depar Devji** (Supra) and **Daniel Kamau Mugambi vs Housing Finance Company of Kenya Limited [2006] eKLR** that were relied upon by the Defendant herein, a chargee could not be restrained from exercising its statutory power of sale where there was a dispute of the amount.

36. However, where a chargor had argued that he had paid its loan in full, it would be foolhardy to allow a chargee to exercise its statutory power of sale merely because case law has held that a chargee could exercise its statutory power of sale even where the amount was disputed. The understanding of this court is that a chargor cannot merely seek an injunction to restrain a chargee from exercising its statutory power of sale merely because it disputes the amount it owes the chargee. In other words, an order for injunction ought not to be granted where a chargor argues that he owes the chargee X amount of money and not Y amount of money that had been demanded by the chargee.

37. In this particular case, the question of whether or not the Plaintiff had overpaid the loan was therefore pertinent as the court that delivered its Ruling on 4th October 2017 had not for a fact determined if the Plaintiff owed the Defendant herein any monies. It was left to the Defendant to determine that indebtedness.

38. This court was thus persuaded to find and hold that the Plaintiff had demonstrated a *prima facie* case warranting the court to determine whether or not he owed the Defendant any monies before it could realise its security herein. The question of whether the variation of interest was contractual or not and if indeed the Plaintiff owed the Defendant any monies were triable and arguable issues that were best left to the trial court to determine.

39. The question of whether or not the Plaintiff had demonstrated that he would suffer irreparable harm which could not be adequately compensated by way of damages in the event an order for injunction was not granted and/or whether this court could grant an order for injunction on a balance of convenience were thus rendered moot.

DISPOSITION

40. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Amended Notice of Motion application dated 29th April 2021 and filed on 25th May 2021 was merited and the same be and is hereby allowed in terms of Prayer No (3) therein for a period of twelve (12) months from the date of this Ruling. Costs of the application will be in the cause.

41. The Plaintiff herein be and is hereby ordered to file an Undertaking as to damages within fourteen (14) days from the date of this Ruling failing which the interlocutory injunction granted herein will automatically lapse.

42. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF SEPTEMBER 2021

J. KAMAU

JUDGE