



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E023 OF 2020

BETWEEN

CRESTA INVESTMENTS LIMITED.....PLAINTIFF

AND

GULF AFRICAN BANK LIMITED.....1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

Introduction

1. It is not in dispute the 1st defendant (“the Bank”) advanced the plaintiff (“the Company”) an aggregate sum of Kshs. 225,700,000.00 evidenced by letters of offer dated 24th May and 23rd July 2018 and variation letter dated 21st February 2019. The purpose of the loan was to take over the Company’s existing loan facilities at NIC Bank Ltd, to finance the purchase of machinery and equipment and to finance working capital. The advances were to be by the following secured immoveable properties (“the suit properties”) and other securities as follows:

- A legal charge for Kshs. 49,000,000.00 over Unit No. 8 erected on LR No. 195/228.
- A legal charge for Kshs. 15,000,000.00 over LR No. Dagoretti/Riruta/S.282 (“the Riruta property”).
- A legal charge for Kshs. 94,000,000.00 over the Penthouse and Terrace on Mirage Towers erected on LR No. 290/18559 (“the Mirage property”).
- A legal charge for Kshs. 68,000,000.00 over Unit No. C erected on LR No. 209/18648 (“the Mombasa Road property”).
- An all asset fixed and floating Debenture dated 18th October 2018 for Kshs. 225,700,000.00 over the Company’s assets.
- Personal guarantees and indemnities for Kshs. 225,700,000.00 by the Company directors.
- Comprehensive insurance cover over the assets from a reputable insurance company and a duly executed letter of set-off.

Plaintiff’s Case

2. The gravamen of the Company’s claim set out in the plaint dated 4th February 2020 is that the loan of Kshs. 225,700,000.00 was to be paid

over a period of 84 months and despite it making payment in excess of Kshs. 8,000,000.00, the facility has accrued interest and penalties amounting to Kshs. 1,682,821.00 which it now disputes as being exorbitant and inflated and that the account is full of irregular entries. The Company claimed that the 84-month period has not elapsed and the Bank was not entitled to recall the loan and exercise its statutory power of sale.

3. The Company complains that the Bank intends to sell the suit properties worth in excess of Kshs. 5,000,000.00 yet the debt is slightly over Kshs. 205,000,000.00 hence the Bank's action is unconscionable, unreasonable, malicious, done in bad faith and irregular in law. The Company has accused the Bank of fraud by failing to issue and serve a statutory notice and notification of sale thereby denying it the right to redeem the security. It also accused the Bank of failing to issue it with statements of account.

4. The Company prayed for a permanent injunction restraining the Bank from selling the suit properties, a declaration that the purported advertisement of the suit property is irregular, premature and contrary to the law and a finding that the money claimed by the Bank is not due, exaggerated, irregular and does not reflect the true status of the account, an order that the Bank furnish it with a true and reconciled statement of the loan account and general and exemplary damages for wrongful advertisement for sale of the suit properties, costs and interest.

5. The plaint was accompanied by a Notice of Motion made, *inter alia*, under **Order 40 rule 1** of the **Civil Procedure Rules** in which the Company sought an injunction to restrain the Bank from selling the suit properties by public auction. The application was supported by the affidavit of Alfred Omwansa Momanyi, a director of the Company, sworn on 4th February 2020 and a further affidavit sworn on 12th February 2020. The facts set out in the deposition mirrored what was set out in the plaint which I have outlined above.

6. Mr Momanyi deponed that the Company had been making regular payments and that he was shocked by the fact that there could be enormous accrued arrears comprising inflated interest and penalties which he disputed. He therefore requested the Bank for clarification and reconciliation by a letter dated 25th July 2018. Since no response was forthcoming from the Bank, he asked the Interest Rates Advisory Centre ("IRAC") to examine his account. He produced the report prepared by IRAC dated 4th February 2020 which showed he had been charged penalties and interest in excess of Kshs. 5,000,000.00.

7. The Company denied that it had been served with the statutory notice hence the advertisement of the suit properties for sale by auction was premature. The Company was of the view that unless the injunction is granted restraining the sale of the suit properties, the Company and its guarantors will suffer irreparable loss and damage.

Defendants' Case

8. The Bank opposed the application through the affidavit of its Legal Officer, Lawi Sato, sworn on 12th February 2020. The Bank denied the Company's allegations and stated that the entire loan amount was disbursed in accordance with the terms of the various letters of offer. Its position was that the Company defaulted on payment several times culminating in a variation dated 21st February 2019 in which the Bank accepted the Company's offer to restructure the loan facility.

9. The Bank contended that at various times, the Company sought indulgence and admitted its indebtedness in various letters. By a letter dated 14th March 2019, the Company requested the Bank to restructure the loan facility. On 14th August 2019, the parties held a meeting where the Company admitted indebtedness and agreed to give the Bank a proposal to clear the arrears. It wrote a letter dated 14th August 2019 referenced, "*Repayment plan for Outstanding Deals*" in which it promised to clear the outstanding debt.

10. Mr Sato deponed that the Bank followed all the statutory procedures before putting up the properties for sale. It issued a 90-day statutory notice dated 9th July 2019 in terms on **section 90(2)** of the **Land Act, 2012**. As the Company failed to make any payment or comply with its proposals to settle the loan, the Bank issued a 40-day notification of sale in accordance with **section 96(2)** of the **Land Act, 2012**. Mr Sato further deponed that both notices were sent to the Company by registered post to its address. In anticipation of the proposed sales, the Bank instructed Centenary Valuers Limited to value the Riruta, Mirage and Mombasa Road properties. Thereafter a 45-day redemption notice was served on the Company together with a Notification of Sale.

11. The Bank stated that the Company owes it Kshs. 205,701,539.29 plus profit and default damages. It denies that the Company complained to it about the profit rate to be charged and that the report of the IRAC dated 4th February 2020 indicated that the Company owes it Kshs. 215,916,159.00. The Bank pleads that the court dismiss the application.

Determination

12. Both parties filed written submissions in support of their respective positions which I have considered. The issue for resolution is whether the court should issue an injunction restraining the Bank from exercising its statutory power of sale. In answering this question, the court must pay homage to the case of ***Giella v Cassman Brown* [1973] EA 358** which settled the principles to be considered by the court when deciding whether or not to grant an interlocutory injunction under **Order 40 rule 1** of the **Civil Procedure Rules**. The Court of Appeal in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** reiterated those principles 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) 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.

13. In his submissions, counsel for the Company raised three grounds upon which it rests its case for an injunction. The first concerns the issue of interest which the Company contended was illegal, irregular and exaggerated. Counsel pointed to a letter dated 25th July 2018 in which Mr Momanyi addressed the Bank on the issue on the following terms, “We note concern that the interest accruing on the above facilities is astronomical by a copy of the letter kindly indulge and grant an opportunity to enable us address this matter urgently.”

14. The Company also relied on the report by IRAC Report to demonstrate that it had been overcharged by Kshs. 5,132,710.16 on account of illegal charges. The report also concluded that the Bank had been charging default damages at 20% per annum contrary to the provisions of the **Banking (Amendment) Act, 2016** which capped the rate of profit at the Central Bank rate plus 4%.

15. Lastly, the Company accused the Bank of purporting to exercise its statutory power of sale based on a disputed debt and without issuing a statutory notice in accordance with **section 90(1)** of the **Land Act, 2012**.

16. To these contentions, the Bank responded that the Company has admitted its indebtedness and is therefore not entitled to an injunction. Counsel for the Bank submitted that the issue of interest only goes to the amount the Company owes and it is settled in law that dispute as to amount is an insufficient ground for restraining a chargee from enforcing its security. It further pointed out that from Company’s own evidence, the IRAC Report confirmed that it owes the substantial sum of Kshs. 215,916,159.95 which it has not offered to pay.

17. In answer to the Company’s complaint that it was not served with the relevant statutory notices, the Bank submitted that it had tendered evidence, annexed to the affidavit of Mr Sato. The evidence showed that the Statutory Notices dated 9th July 2019 and 12th October, 2019 were sent to the Company as proved by the certificates of posting hence the Bank’s right to sell the charged properties had accrued.

18. I find and hold that there is sufficient uncontroverted evidence that the Company is indebted to the Bank. It has indeed admitted its indebtedness in several letters to the Bank. This means the issue of interest only determines the extent of indebtedness and it is well established that the court cannot restrain the Bank from exercising its power of sale merely on the ground that the debt is disputed (see **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR**). In any case, the Company’s averment in the plaint that it has been charged exaggerated, illegal and irregular interest and penalties is a vague and embarrassing allegation in so far as it does not identify the provisions of the contract documents breached or the law violated.

19. The Bank has answered the Company’s accusation that it has not been served with statutory notices required under **section 90** and **96** of the **Land Act, 2012** by providing copies of the notices and accompanying certificates of the postage. The Company has not controverted these notices and the fact that they were sent to it by registered post hence a prima facie case cannot be founded on this allegation.

20. Having reached the conclusion that the Company has not established a prima facie case with a probability of success, the race to the injunction comes to an end.

Disposition

21. The Notice of Motion dated 4th April 2020 is dismissed with costs to the defendants. For avoidance of doubt the interim injunction granted on 14th February 2020 is discharged.

22. The sum of Kshs. 500,000/- deposited in court shall be released to the 1st defendant in order to settle the costs of the postponed auction and any balance shall be credited to the plaintiff’s loan account.

DATED and DELIVERED at NAIROBI this 26th day of JUNE 2020.

D. S. MAJANJA

JUDGE

Mr Ongegu instructed by Ongegu and Associates Advocates for the plaintiffs.

Ms Abuya instructed by Walker Kontos Advocates for the defendants.