



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. E 385 OF 2019

COLLOGNE INVESTMENTS LIMITED.....PLAINTIFF

- VERSUS -

BANK OF AFRICA KENYA LIMITED.....DEFENDANT

NAKUMATT HOLDINGS LIMITED

(UNDER ADMINISTRATION).....PROPOSED INTERESTED PARTY

RULING

1. By this action the plaintiff **COLLOGNE INVESTMENTS LIMITED** seeks the prayers for, declaration that statutory notices to sell the plaintiff's charged property served on it by **BANK OF AFRICA KENYA LIMITED** (the Bank) are null and void, an order restraining the Bank from disposing the charged property and, a discharge of the plaintiff's guarantee of the debt of **NAKUMATT HOLDINGS LTD** (the interested party).

2. The plaintiff filed a Notice of Motion application dated 1st November 2019 seeking interlocutory injunction to restrain the Bank, pending the hearing and determination of this suit, from selling the plaintiff's property, known as L.R. No. 209/11158 Nairobi, which property is charged to the Bank as security for the indebtedness to the Bank by the interested party.

3. The affidavit in support of the application is sworn by the plaintiff's director Atulkumar Maganlal Shah. The deponent confirmed that the Bank served the requisite statutory notice on the interested party. The deponent however in respect to those notice deponed:

“That the respondent (the Bank) claims by the said Notices arrears of Ksh 404,158,113.25 and USD 100,327.40, plus unlawful unspecified unarticulated interest and charges from the principal debtor (the interested party and the applicant) the plaintiff which amount I deny vehemently and whose computation and basis I contend.”

4. The deponent proceeded to state that the Bank's claim for non-computed and unlawful interest and charges, rendered the statutory notices incompetent and therefore null and void. He alleged that the claim of in USD was in error and wrongful on the part of the Bank. He alleged there were unauthorized transfers effected from the interested party's account to a Law Firm and to **Pricewaterhousecoopers Ltd** (PwC). Further that the Bank failed the furnish the interested party with bank statements when requested.

5. The deponed referred to what it alleged was a report of Interest Rates Advisory Centre (IRAC) which he stated established an overcharge on the interested party's account by an amount of Ksh 14,096,077/=.

6. The deponent alleged wrong doing on the part of the Bank in its lending to the interested party. In that regard he deponed the Bank in granting financial facility to the interested party *“granted the said facilities predatorily on the basis of the presence of the subject charge and security and...in acting selfishly should not be permitted by this court to benefit from its own recklessness and/or imprudence at the expense of the applicant's property”*. The deponent, in regard to that lending, stated:

“That I believe that if the facilities were not disbursed with the singular agenda of deliberately burdening the borrower beyond the point of return (sic) and therefore appropriating the applicant's subject property then the respondent ought to have committed to the rejuvenating of the borrower's operations by adhering to the IBR (Independent Business Review Report).”

7. The Bank relied on the affidavit of Kenneth Mawira Murithi its Senior Legal Counsel.

8. He stated that the facilities afforded to the interested party by the Bank were secured amongst others by the charge of the plaintiff's property. That the said charge operated as a continuing security for the payment, by the interested party, of the aggregate sum of Ksh 700,000,000. That the interested party failed to repay the facility when demanded to do so and there was therefore default which entitled the Bank to exercise various remedies which included, but not limited to, the Bank's Statutory Power of sale of the charged property. The deponent annexed to his affidavit various notifications, to the Credit Bureau and various demand letters issued to the interested party and copied to the plaintiff. Because there was no remedy made to the default the Bank proceeded to issue the plaintiff with statutory notices dated 6th May 2019 and 5th May 2019.

9. The deponent referred to the payments it made to PwC and the Law Firm. He stated the bank was entitled to make that payment, and also was entitled to debit the interested party's account pursuant to the Bank's standard terms of engagement which required the interested party to reimburse it all legal fees and expenses incurred by the Bank in obtaining legal advice in connection with dealings on behalf of the interested party.

10. The Bank denied that its lending was predatory, reckless or imprudent.

ANALYSIS

11. The plaintiff, in order to succeed in its application ought to establish that the principles of granting an injunction, enunciated in the case **Giella v Cassman Brown Co. Ltd (1973) E.A 358** are met. In that case the principles of granting an injunction was stated thus:

“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

12. The Court of Appeal in the case **Mbuthia v Jimba Credit Finance Corporation & Another (1988) eKLR** discussed the correct approach to dealing with an interlocutory injunction. The court in that case stated:

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits”

13. With the above in mind I need to first consider whether the plaintiff has shown a prima facie case with probability of success. In **Mrao Ltd v First America Bank of Kenya Ltd & 2 Others (2003) eKLR** the court of appeal in discussing when a party can be said to have shown a prima facie case with probability of success set the standard to so establishing thus:

“[A] prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

14. The banking facility was granted to the interested party. It is not denied that the Bank indeed granted that facility. What the plaintiff alleges is that the Bank applied unlawful interest rates. The plaintiff does not also deny that the interested party defaulted in this repayment of its facility. Nor does the plaintiff deny that the Bank served the statutory notices on the interested party which notices were copied to the plaintiff.

15. What the plaintiff seems to raise as the basis for seeking to restrain the Bank from exercising its power of sale is that the amount demanded by the Bank was inaccurate. It is settled position in law that a dispute of the amount due is not a basis of restraining the exercise of statutory power of sale. This is what was stated in **Mrao case (supra)**. The court of appeal in that case stated:

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged.”

16. It is also noteworthy that the plaintiff relied on a report of IRAC which report was not signed by the maker. It therefore has no weight in respect to the issues before court.

17. It follows from the above discussion that the plaintiff has failed to show a prima facie case with probability of success. The statutory notices, issued by the Bank, do not on a prima facie basis contravene the law and again on prima facie basis the bank cannot be faulted for debiting the interest party with expenses it incurred in recovery of the loaned amount.

18. Having failed to prove the first principle of granting an injunction I will not proceed to consider the other two principles. On the whole the plaintiff's application is unmeritorious and it does fail. The costs of the application will follow the event.

CONCLUSION

19. In the end the Notice of Motion dated 1st November 2019 is dismissed with costs to the defendant. Parties will be given directions on the case management conference (CMC) at the reading of this Ruling.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of JUNE 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the plaintiff:

For the defendant:

For the Proposed Interested Party:

ORDER

This decision is hereby virtually delivered this 18th day of June, 2020.

MARY KASANGO

JUDGE