



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 16 OF 2020

LONGONOT VENTURES LTD.....PLAINTIFF

VERSUS

JAMII BORA BANK LTD.....DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. 31 OF 2020

LONGONOT VENTURES LTD.....PLAINTIFF

VERSUS

JAMII BORA BANK LTD.....DEFENDANT

RULING

Brief Background.

1. The facts leading to the Plaintiff's case and application dated 20th May 2020 are largely uncontroverted.

The plaintiff was advanced Term Loan facilities by the defendant upon its request whose terms and conditions were stated in the letter of offer dated the 21st May 2015, in the sum of Kshs.30,000,000/= (Thirty Million and a letter of credit facility of Kshs.40,000,000/= (Forty Million), and a further Kshs.2,000,000/= by a letter of offer dated 22/1/2020 for purposes of structural construction and acquisition of plant machineries for concrete poles factory by the plaintiff.

2. The said loan facilities were secured by the plaintiff's Directors personal properties; **LR. Njoro/Ngata Block 1/4661, LR Naivasha/Mwichiringiri Block 4/3177** and **LR Njoro/Ngata Block 1/3638** (hereinafter called the "suit properties").

3. The said directors, **Martin Munjogu Munyui, Anne Njoki Muhoro and Jalenga Elizabeth Muhoro** executed charges over the suit properties together with a personal guarantee by Ann Njoki muhoro, which were duly registered against the suit titles.

4. For reasons stated in the plaint dated 20th May 2020 and filed on even date, the plaintiff failed to repay the Loan facility in terms of the letter of offer. Of relevance in the application is that the facility was repayable on demand and unless otherwise demanded, the loan was to be repaid in sixty (60) months, with a moratorium on principal for nine (9) months during which interest of Kshs.600, 000/= was payable on monthly basis and thereafter by monthly instalment of Kshs.943,756.84/= until full payment.

5. For the Letter of Credit loan facility, the borrower (plaintiff) was to repay within sixty (60) months with a moratorium on principle for nine (9) months during which interest of Kshs.800,000/= was to be payable on monthly basis and thereafter in instalments of Kshs.1,258,342.46/= until full payment.

The plaintiff failed to honour the said agreed terms.

By the time of filing of this suit, the plaintiff, by own submissions had made repayment in the sum of Kshs.26,639,533/= only.

6. It is upon the above backdrop that the Defendant, upon several demands and requests to the plaintiff to regularize the loan repayment

and its failure and/or refusal to repay, sought realization of the securities to safeguard its interests.

7. Between the 10th of September 2019 and 14th January 2020, the Defendant served upon the chargors, who are not parties in this suit all the **Statutory Notices pursuant to Section 90 (1)(2)(3) of the Land Act 2012**, and such notices copied to the plaintiff, the principal borrower, including the 40 days Redemption Notice dated 14th January 2020 pursuant to **Section 96(2) and (3) of the Land Act 2012**, thus kicking off recovery process.

Pursuant to the above notices, the plaintiff approached this court by the application before.

8. The plaintiff's application dated 20th May 2020.

It is based on **Provisions of Order 40 Rules 1 and 2, of the Civil Procedure Rules(CPR)and Section 1A, 1B and 3A of the Civil**

Procedure Act, seeking the following ORDERS:

1. Spent

2. Spent

3. That this Honourable Court be pleased to temporarily restrain the Defendant or its authorized agents, Auctioneers or any other person acting on its instructions by way of an injunction from foreclosing, advertising for sale by Public Auction, sale by private treaty or in any other manner interfering with the suit properties LR. NO. Njoro Ngata Block 1/4661 and L.R. Naivasha Mwachiringiri Block 4/3177 and pending the hearing and determination of this suit.

4. That costs of this application be provided for.

9. By the suit filed as **HCC NO. 31 of 2020** which was consolidated with this suit, L.R. NO. Njoro/Ngata Block 1/3638 was added to the pleadings as a suit property.

Two affidavits in support of the application were sworn by one Martin M. Munyui a director of the Plaintiff Company, in whose name suit property, **L.R. Naivasha Mwachiringiri Block 4/3177** is registered. It was sworn on the 20th May 2020.

10. In opposing the application, the Respondent Bank, by its legal officer, Valence Muka swore the Replying Affidavit on the 24th June 2020.

To urge their respective positions, both parties filed written submissions on the 13th July 2020 and 14th July 2020 respectfully.

I have considered the application, the affidavits and submissions by both parties.

11. Issue for Determination.

Whether the Applicant's application meets the threshold and criteria for grant of the injunctive orders sought.

12. Analysis and determination.

Order 40 Rule 1 & 2 of the Civil Procedure Rules states the circumstances upon which temporary injunctive orders may be granted, including injunctions to restrain breach of contract or other injury, and in particular for purposes of staying and preventing damages, alienation, sale or disposition of a property in dispute, as well as restraining a defendant from committing breach of contract or other injury arising from the same contract to the same property or rights.

13. The principles upon which an injunction may be grounded are stated in the old age **Court of Appeal** authoritative case of **Giella Vs. Cassman Brown Co. Ltd (1973) EA 358** that;

An applicant must show;

a. A prima facie case with a probability of success.

b. That unless an interlocutory injunction is granted, the applicant will suffer irreparable harm which would not adequately be compensated by an award of damages.

c. That if the court is in doubt, it will decide an application on balance of convenience.

14. The **Court of Appeal** in the case, **Charter House Investments Ltd Vs. Simon K. Sang & 3 Others (2010)e KLR** and **Ngurumani Ltd Vs. Jan Bonde Nielson & 2 Others (2014) e KLR** further expounded and added flesh to the **Giella Cassman** case, that

“There are 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...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 a *prima facie* case is established, then irreparable injury and balance of convenience need no consideration”.

15. Prima facie case with Probability of Success:

A contract is an agreement between two or more parties whereof they set down the agreed terms and conditions of engagement. It is binding on the parties. A court of law cannot purport to re-write the contract or change the terms thereof unless the said contract was obtained through an illegality, misrepresentation, fraudulently or through coercion –

Pius Kimayo Langat Vs. Co-operative Bank of Kenya Ltd (2017) e KLR.

16 I have perused the letter of offer dated the 21st May 2015.

As much as the applicant purports to state that the loan was to be repaid from the proceeds of sale of electricity poles to Kenya Power and Lighting Company (KPLC) upon facilitating construction of the concrete factory, and that the defendant was to disburse the funds on time, I have found no such conditions in the letter of offer.

Further, other than alleging that there was delay by the Respondent in disbursing the funds, no evidence was laid before the court to demonstrate such delay.

17. Indeed, it has not been alleged nor proved that **Clause 9 & 11** of the letter of offer that the Architects certificates, work plans, contractor’s progress reports were presented to the Respondent, and that no disbursements/payments were made.

This is in complete contrast to the applicant’s submission that between 21st August 2015 and 21st October 2016, a total disbursements of Kshs.56 million was made.

It is trite that it is not enough to allege, evidence ought to be adduced to prove the allegation – **Section 107 Evidence Act**.

I find and hold that the Respondent cannot be blamed for the non-payment of the loan due to the alleged delay in disbursement; as this was not a condition precedent in the Contract between the parties. Further no such delay has been proved.

18. The Court of **Appeal in Mrao Ltd Vs. First American Bank of Kenya Ltd (2003) e KLR** rendered that

“---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 the Applicant’s case upon trial--- it is a case 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---”.

19. I have seen the request letters by the applicant to the respondent for release of funds. The funds were released. No complaints were registered over the alleged delays. I am satisfied that the Respondent complied with the terms of the contract, and therefore was not to blame for the applicant’s inability and to repay the loan.

20. It is also instructive to note that the applicant acknowledges its inability to repay the loan. I have seen the loan account statements. The outstanding loan as at 15th June 2020 as Kshs.73,579,397.37, with arrears of Shs.17,604,864.47.

21. The only issue raised by the applicant is a purported failure by the Respondent to apply **Section 33B of the Banking Act (Repealed)** that it should have capped the interest rates from the agreed rates in the contract from the effective date, the 14th September 2016. The loan was advanced in 2015, save for the Kshs.2 million advanced in 2020.

The Supreme Court in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Ltd & 2 Others (2012) e KLR** rendered that

“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate to matters of procedures or evidence are *prima facie* prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature”.

22. Thus, the amendment to **Section 33B (Repealed)** did not provide for retrospective application of the capped interest rates for previously valid rights nor was it meant to inhibit the existing rights and obligations of parties as held in the case **Vehicle and Equipment Leasing Ltd Vs. Jamii Bora Bank Ltd (2017) e KLR** where the court rendered and held that **Section 33B of the Act** does not apply retrospectively to affect and inhibit rights of parties which accrued prior to the 14th September 2016, the effective date. See also **National Bank of Kenya Ltd Vs. Pipe plastic Samkolit Ltd & another**, to the same effect.

23. It is also now trite that a dispute on interest involves a dispute on accounts, the amounts owed or owing. I have stated earlier in this ruling that the applicant does not dispute the fact that it is in arrears and indeed owes the Respondent and is unable to repay, and further gives proposals on mode of valuation and sale of the suit properties and the factory. To that extend, the issue of accounts and interest is a non-issue, and raises no *prima facie* issue worthy of delaying realization of the securities by the Respondent.

24. In the **MRAO Case (Supra)**, the court held that

“---a dispute over interest or sums due is not a good ground for a court to issue an injunction restraining a mortgagee from exercising its Statutory rights---”.

Cumulatively, the court finds that the Applicant has not demonstrated a *prima facie* case with probability of success.

25. Irreparable harm that cannot be adequately compensated by an award of damages.

It is the obligation of the applicant to mount all evidence to show that unless an interlocutory/permanent injunction is not granted, it will suffer harm and loss that cannot possibly be compensated in damages.

The applicant admits having been served with all the necessary **Statutory notices under the Land Act 2012**. It however raises an issue that it was not served with the valuation reports of the suit properties.

26. Sections 97 (1) and 100 (3) of Land Act, 202 imposes a duty of care by the chargee while exercising its rights under the charge. Whereas the property where the factory is built is charged to the respondent, the equipment and machinery thereon is secured under a Debenture, by the Bank. The respondent cannot sale the machinery and equipment together with the land. That therefore allays the applicant's fear that there would be an under sale as the equipment and machinery were not valued for purposes of a sale by Public Auction as envisaged under **Section 96 of the Land Act**.

27. The applicant has urged that it has not been served with a valuation report of the suit properties, and that the values stated by the Auctioneers in their Notification of Sale Notices are under values. It therefore proposes that a fresh valuation be undertaken to include, and determine the value of the factory including machineries and buildings, and all to be sold as a going concern.

28. Although **Section 90 Lands Act** imposes a Statutory obligation on the chargee to serve the chargor with the statutory notices and nothing more, it is prudent that the valuation reports of the charged properties be served upon the chargors prior to the sale to inform themselves of the forced sale values.

Section 97 (2) Lands Act places an obligation to the chargee to carry out a forced sale valuation before exercising the right to sale. Such valuation ought to be within twelve (12) months of the intended sale.

No valuation reports have been shown (exhibited) by the Respondent.

29. The only report is in respect of one of the charged properties, **L.R NO. Njoro/Ngata Block 1/3638**.

That leaves the applicant with the valuations stated in the statutory notices, which they state are under valuations of the properties without the benefit of the reports.

If the valuations were indeed undertaken, it would make no sense that the Respondent would fail to exhibit them in its replying affidavit and/or serve the same to the applicant as it is an issue that was duly raised in the pleadings and the application. The applicant need not have requested for them as submitted by the respondent. The respondent ought to have furnished the reports to the respondent as a matter of course.

30. It has been suggested by the respondent that should the court find that the valuation reports were not properly served, any injunctive relief should be limited up to until a point when the same is duly and properly served.

In my view, the above proposition presupposes that indeed the valuations were done, and may not have been properly served, and cited the holding in Court of Appeal decision in **National**

Bank of Kenya Ltd Vs. Shimmers Plaza Ltd (2009)eKLR where such an order was made, that

“---the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh notice in compliance with the law---”.

That sounds like a viable option, but does not change my finding that the applicant has not made out a *prima facie* case with a probability of success.

31. It has not been stated and/or proved that should the suit properties be sold, the applicant would suffer loss that cannot be compensated by an award of damages.

In addition, the applicant has not put forth any evidence that the respondent is financially handicapped and would not be able to adequately compensate the applicant if it should suffer loss and harm as a refusal of an order of injunction.

32. As stated in the **Ngurumani Ltd Case (supra)**,

“---the equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury that is actual, substantial and demonstrable---An injury is irreparable where there is no standard by which the amount can be measured with reasonable accuracy or the injury or harm is of such a nature that monetary compensation of whatever amount will never be adequate remedy”.

33. The subject of this suit and application is Land. It's value can be reasonably measured by valuations and their worth determined. Monetary compensation would be apt and appropriate in the circumstances. To that extent, I find and hold that no irreparable loss and harm would be occasioned to the applicant that would not be adequately compensated in damages.

There is no doubt that the continued non-payment of the loan arrears by the applicant, and the continued interest accruals onto the said loan would prejudice the respondent's interests more, as opposed to the applicant's, who has shown that it is completely unable to repay the loan, save by way of sale of the suit properties. Without a doubt, and in the circumstances, the balance of convenience tilts in favour of the respondent.

34. In the result, I find the applicant's application dated 20th May 2020 to be without merit, and issue the following **ORDERS**:

a. That an order of LIMITED temporary injunction is issued to restrain the respondent by its agents, servants and auctioneers or any other person acting on its instructions from advertising for sale by Public Auction or private treaty or in any other manner interfering with the suit properties UNTIL;

b. Such time that the respondent shall properly serve to the applicant and the individual chargors, the valuation reports in respect of the suit properties, undertaken within twelve (12) months OR does cause such valuation reports to be undertaken, clearly stating the open market and forced sale values of the suit properties.

c. Upon such valuation reports being properly served upon the applicant and the individual Chargors, there shall be a grace period of thirty (30) days before the respondent may proceed with the process of realization of the securities, from the stage where such process was stopped by the Interim Order of Injunction dated the 27th May, 2020.

d. The temporary order of injunction granted by the Court on 27th May 2020 and issued on the 5th June 2020 shall remain in force, to allow compliance with Order (3) above by the respondent.

e. The said limited interim injunction order shall however lapse upon expiry of the 30 days upon service of the valuation reports upon the applicant and chargors by the respondent in line with (2) and (3) above unless otherwise varied by an order of the court. Orders accordingly.

Delivered, Signed and Dated electronically at Nakuru this 19th day of August 2020.

J.N. MULWA

HIGH COURT JUDGE.

Delivered electronically, by Email to:

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