



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. E081OF 2020

BETWEEN

PROFESSIONAL CONSULTANTS LIMITED.....PLAINTIFF

AND

SBM BANK (KENYA) LIMITED..... DEFENDANT

RULING

Introduction

1. The defendant (“the Bank”) is the successor of Fidelity Commercial Bank Limited (“Fidelity Bank”) and Chase Bank (Kenya) Limited (“Chase Bank”). By a letter of offer dated 21st October 2009, Chase Bank (Kenya) Limited offered to the plaintiff and the plaintiff accepted an overdraft facility amounting to Kshs. 4,500,000.00 secured by the Plaintiff’s fixed deposit and directors guarantees. By a letter of offer dated 13th June 2015, Fidelity Bank offered to the plaintiff and the plaintiff accepted an overdraft facility of Kshs. 13,500,000.00 and a term loan of Kshs. 2,500,000.00 secured by a legal charge over the property known as LR No. 13460/71 (Original No. 12460/7/3) (“the suit property”).

2. The Plaintiff has filed a Notice of Motion dated 23rd March 2020 made, inter alia, under **Order 40 rules 1, 2 and 3** of the **Civil Procedure Rules** seeking an injunction to restrain the Bank from selling the suit property by public auction in exercise of its statutory power of sale. The application is supported by the affidavit of Jude Loveday, a director of the plaintiff, sworn on 23rd March 2020. The application is opposed by the Bank through the affidavit of its Legal Officer, Kevin Kimani, sworn on 8th June 2020. Both parties filed written submissions which their advocates highlighted briefly.

Grounds of the Application

3. The gravamen of the Plaintiff’s claim is set out at para. 13 of the plaint where it states as follows

[13] The Plaintiff avers that the Defendant’s notice dated 4th March 2019 does not meet the statutory edicts set out in Sections 90,96 and 97 of the Land Act, inter alia, in so far as it included the sum of Kshs. 7,053,820.12 that was not part of the facility secured by the charged property.

4. The plaintiff does not dispute the fact that the Bank issued a statutory notice under **section 90** of the **Land Act, 2012** (“the **Land Act**”) dated 4th March 2019 demanding payment of Kshs. 34,087,925.51 due and owing as at that day and made up follows;

(a) Overdraft facility issued by Chase Bank account no. 0038***** for Kshs. 7,053,820.15.

(b) Overdraft facility issued by Fidelity Bank account no. 0650***** for Kshs. 23,583,361.40.

(c) Term loan issued by Fidelity Bank account no. 0650***** for Kshs. 3,450,743.96.

5. The Plaintiff complained that the facilities in question were granted by two different banks with different terms and conditions. That the facility offered by Chase Bank provided that interest would accrue at a rate of 13% per annum while that offered by Fidelity Bank would accrue interest at 19% per annum. The Plaintiff pleaded that the two clauses on interest payable were subject to **section 33B** of the **Banking Act (Chapter 488 of the Laws of Kenya)** set out the interest rates at no more than 4% above the base rate set by the Central Bank of Kenya.

6. The Plaintiff complained that it was never issued with a copy of the registered charge and/or guarantees by Fidelity Bank and have never been issued with a deed assigning the rights of Fidelity Bank to the Bank. It also claims that it is a stranger to the dealing between the Bank, Chase Bank and Fidelity Bank.

7. As regards the intended auction, the Plaintiff complained that the Bank has never issued a redemption notice in contravention of **section 96(2)** of the **Land Act**. It further complained that the Bank did not carry out a forced sale valuation as required by **section 97(2)** of the **Land Act**.

Whether the Plaintiff has established its case

8. As the application before the court is one for an interlocutory injunction, the parties agreed the principles guiding the exercise of this court's discretion are those settled in ***Giella v Cassman Brown [1973] EA 348***. The applicant has to satisfy three requirements; establish that it has a prima facie case with a probability of success, demonstrate irreparable injury if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour.

9. Before I proceed to deal with the substantive issues raised by the parties, let me deal with the relationship between the Bank, Chase Bank and Fidelity Bank. Although the Plaintiff claimed that it was a stranger to the relationship between the three banks, the defendant correctly pointed out that the fact that the Bank was a successor of two other banks was an admitted fact. As paragraph 4 and 5 of the plaint, the plaintiff admits that, *"The Defendant is the legal successor to Chase Bank Kenya Limited and Fidelity Commercial Bank Limited upon the Defendant acquiring the two banks in separate transactions as per information available to the general public."* Apart from this admissions, the deposition filed on behalf of the plaintiff and the defendant show that the parties were in discussion and nothing arose about the nature of the legal relationship between the parties. This issue, I therefore find is not germane to this determination.

10. The Plaintiff has not denied that it is indebted to the Bank nor denied the fact that it received the statutory notice dated 4th March 2020. The plaintiff has raised the issue of interest rates but that issue alone would not entitle the Plaintiff to an injunction in view of the plaintiff's admission of indebtedness (see ***Fina Bank Limited v Ronal Limited [2001] 1 EA 54***). I think the only issue for resolution necessary to dispose of the application is whether the statutory notice so issued is valid in so far as it includes an amount that was not secured by the charge.

11. It is common ground that the facility granted by Chase Bank was contained in the letter of offer dated 21st October 2009. At Clause 8 of the letter the security for the facility was a lien over fixed deposits for Kshs. 5,000,000.00 in the name of the plaintiff supported by a letter of set off and a personal Guarantee and Indemnity executed by the directors; Jude Ian Wayne Loveday and George Omolo Odawa. The Charge over the suit property was executed in 2013 following the letter of offer dated 13th June 2015 issued by Fidelity Bank. At the time both banks were separate and there is no way the earlier facilities would be incorporated in the later security unless by agreement of the parties. They two agreements, having been issued by separate banks, always remained separate.

12. I agree with the plaintiff the statutory notice dated 4th March 2020 is defective as it includes an amount not secured by the charge. In other words, it impedes the Plaintiff's right to redeem the suit property by including an amount that is outside the confines of the charge. The charge only secured the overdraft and term loan granted by Fidelity Bank.

13. Counsel for the Bank accepted that in the event that court finds irregularity in the manner the notices were issued, it should direct the Bank to comply with its statutory obligations. It relied on the case of ***Yusuf Abdi Ali Co, Limited v Family Bank Limited [2015] eKLR*** where the court allowed the bank to regularize the position by issuing fresh notices where the notice was found defective.

14. Since the plaintiff is indebted to the Bank and the validity of the charge is not disputed, the plaintiff's obligation to make payment under the charge still stands. I am inclined to take the course suggested by counsel for the Bank which was approved by the Court of Appeal in ***National Bank of Kenya v Shimmers Plaza Limited NRB CA Civil Appeal No. 26 of 2009 [2009] eKLR*** where it observed as follows:

An injunction is an equitable and discretionary remedy. The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law.

15. I shall therefore grant an injunction but only limited to the period necessary for the defendant to comply with the law by issuing and sending to the plaintiff a statutory notice in line with this ruling.

Disposition

16. I allow the Notice of Motion dated 23rd March 2020 on the following terms:

(a) The defendant be and is hereby restrained from exercising its statutory power of sale in respect of the property known as **LR NO. 13460/71 (Original No. 12460/7/3)** unless it issues a fresh statutory notice under **section 90** of the **Land Act, 2012**.

(b) The defendant shall bear the costs of the application.

DATED and DELIVERED at NAIROBI this 17th day of AUGUST 2020.

D. S. MAJANJA

JUDGE

Ms Oduor instructed by Oregu and Odhiambo Advocates for the Plaintiff.

Ms Kosgey instructed by Mburu Maina and Company Advocates for the Defendant.