REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 366 OF 2015

MORRIS AND COMPANY (2004) LIMITED.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK.....1ST DEFENDANT

KELBROOK LIMITED.....2ND DEFENDANT

DIAMOND HASHAM LALJI.....3RD DEFENDANT

PRAKASH SANAS.....4TH DEFENDANT

AND

MARIGU INVESTMENT LIMITED.....APPLICANT

RULING

1. Brought as a derivative suit by Marigu Investments Limited (**Marigu**) for the benefit of Morris & Company (2004) Limited (**Morris or the Plaintiff**) is an action formulated around the concept of reckless lending. The proposition put forward by the action is that the Defendants, acting in concert, caused Morris to enter into credit agreements with Diamond Trust Bank (**Diamond or the 1st Defendant**) whose consequence is that Morris is now over-indebted.

2. It is asserted that arrangement was massaged to lead to the sale of the property known as LR. No. 209/8201 (**the Suit Property**) which secured the "over-debt". The Plaintiff considers the suit property to be the pearl in its stable.

3. Commenting on what an over-debt means in the context of reckless lending, the High Court of South Africa (Gauteng Division, Pretoria) in Case Number A509/2107 in the matter between Shoprite Investments Limited and the National Credit Regulator stated:-

> **"[23] As a starting point, section 81 (3) prohibits a credit grantor from entering into a *"reckless credit agreement"* with a customer. In terms of section 80(1) (b)(ii) a credit agreement is *"reckless"* if the conclusion thereof would make the consumer *"over indebted"*. To determine whether a customer would be *"over-indebted"* upon conclusion of a credit agreement, a credit provider must have regard to the debt repayment history of the consumer under credit agreements and to the consumer's financial means, prospects and obligations."**

4. And I have to agree with counsel for the Plaintiff that reckless lending runs afoul the Central Bank of Kenya Prudential Guidelines 2013 on Consumer Protection which obligates a bank, when dealing with its customers, to be guided by the principles of fairness, reliability, transparency, equity and responsiveness. A principle of fairness is that a bank will not lend recklessly or negligently.

5. This suit is essentially brought to protect the suit property and for starters, the Plaintiff seeks an interlocutory relief to restrain the Bank for alienating, selling or disposing of or in any way dealing the suit property.

6. By way of brief background, Marigu holds 4,500 shares in Morris. This would be paltry when compared to 195,000 shares now held by Kelbrook Limited (**Kelbrook or the 2nd Defendant**). At incorporation, Marigu held the same number

of shares it holds today while Kelbrook held 5,500 shares. Marigu questions the substantial increase in Kelbrook shares and that forms the subject matter of Civil Suit Nairobi **HCCC No. 263 of 2018 – Marigu Investment –vs- Kelbrook Ltd & 2 Others (Civil suit 263 of 2018)**.

7. It is common ground that Kshs.330,000,000 and USD 2,000,000 was advanced to Morris and secured by a first legal charge over the suit property. What causes concern to the Plaintiff are further facilities created and secured by the suit property and which it asserts were not used for the benefit of Morris. These are listed as:-

i. A further charge of Kshs.70,000,000/= dated 31st March 2015.

ii. A second further charge for Kshs.937,000,000/= registered on 18th August 2017.

iii. A third further charge for Kshs.983,000,000/= registered on 18th August 2017.

iv. A forth further charge for Kshs.100,000,000/=

registered on 29th December 2017.

The Bank itself concedes to the grant of the above facilities but points out that the third legal charge is for Kshs.83,000,000/= and not Kshs.983,000,000/= advanced to Maize Milling Company Limited. That contestation will easily be resolved by looking at the title to the suit property and the charge document itself. But for the purpose of the application at hand nothing turns on the difference.

8. The Plaintiff contends that the further advances were made when Morris was in financial distress and that the Bank had in fact sought to realize the security because of default in regard to the first facility, of Kshs.330,000,000 and USD 2,000,000. It is common ground that the Bank had issued a statutory Notice dated 26th May 2017 under Section 92 of the Land Act and another of 4th October 2017 under Section 96(3) of the same statute.

9. In this Court's Ruling of 9th November 2018, in which this Court granted leave to Marigu to continue this suit as a derivative action, I set out the following further backdrop to the Plaintiff's case:-

"…….. 6. Marigu asserts that a scheme has been contrived between the Bank, Kelbrook (the 2nd Defendant), Diamond Hasham Lalji (the 3rd Defendant) and Prakash Sanas (the 4th Defendant) to fraudulently dissipate the suit property which is the substantial asset of the Company. Lalji and Sanas are directors of the Company representing the interest of Kelbrook.

7. This is how Marigu sees the ruse playing out. The suit property has been charged to a sum that far outstrips its value. It is alleged that it has been charged to secure a total advancement of Kshs 2,620,000,000 which is almost three times its value. This has been done when the Company was already in default of a much smaller sum and so the repayment of the further advances is not feasible. Because default continues, the Defendants have made arrangements to sell the said property to an entity known as DPL Festive limited through private treaty for a sum of Kshs 780,000,000. Marigu alleges this to be much less than the value of the property."

10. The Bank defends all the facilities it granted to Morris or in which Morris provided the suit property as security. It further defends its decision to issue the 90 days statutory Notice dated 26th May 2017 and justifies on default on the part of Morris.

11. The Bank avers that following the issuance of the statutory Notice, Morris convened a board meeting on 13th July 2017 where it was resolved that a valuation be conducted on the company's property with a view to disposing of it in order to offset the debts due. The Bank tells the story of how negotiations between the Bank and Morris culminated into a settlement agreement dated 21st July 2017 with the following highlights:-

a) There would be a 45 days moratorium on payment of the principal sums owing from the Applicant during which time, interest will be serviced on the outstanding principal sums owed.

b) Provided there is no breach of the terms of the moratorium, the bank would review the Applicant's account after 180 days to confirm viability of the Applicant as a going concern and for consideration by the Bank at its sole discretion for provision of additional working capital.

c) It was also noted that owing to poor performance of the financial facilities extended to the Applicant, the

Statutory Notice dated 26th May 2017 would continue to run in accordance with their tenors and in the event of any breach of the moratorium terms hereinabove, the Bank would proceed with the process contemplated in the Statutory Notices.

12. It states that following breach of the sale agreement it issued a 40 days notification of sale dated 4th October 2017. It is further averred that Morris negotiated a sale of the suit land by way of private treaty to a third party, DPL, at a price of Kshs.730,000,000/= and the Bank approved the arrangement, but Morris failed to convene an Extraordinary General Meeting to endorse the arrangement.

13. Regarding the allegation of reckless and irresponsible lending, the Bank states that the facilities to Raffia Bags (East Africa) Limited and Maize Milling Company Limited were granted before the statutory notices in respect of the facilities was issued on 26th May 2017. The Court is asked to give regard to the letters of offer dated 26th September 2016. It is then said that the facilities covered by the second further charge and third further charge were extended way before the registration of the charges on 18th August 2017.

14. The position of the 2nd, 3rd and 4th Defendants is in many ways in sync with that of the Bank. They state that Morris is insolvent and not operating, facts well known to Marigu. They accuse Marigu of not offering any solution to the impending auction and attempting to scuttle a sale whose revenue is above the forced sale value of the property.

15. Although the three give a long background to the changes in shareholding, that information belongs to a dispute elsewhere (**HCCC No. 263 of 2018**). Regarding the facilities, the trio state that all facilities were borrowed by Morris in accordance with the Articles of Association and the law and that no funds have been siphoned as alleged.

16. They strive to make the point that the proposed purchaser has offered a price of Kshs.730,000,000/= which is above 75% of the market value of the property which stands at Kshs.675,000,000/=. Again, Marigu is berated for failing to offer any useful alternative.

17. This is an application for temporary injunction where the principles set out:- in **Giella v Cassman Brown** reign supreme;

> **"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."**

18. I have given regard to the submissions of the parties herein and although lengthy, the matter seems to the Court to be straightforward.

19. This application comes on the heels of an application in which Marigu sought leave to continue this matter as a derivative suit. In granting permission, the Court had to test the viability of the action, and came to a conclusion that matters raised by it were not a trifle. In doing so the Court made the following observations:-

> **"31. Anything curious about those arrangements? It has to be remembered that as at 27th May 2017, DTB, the Company and all the Defendants were fully aware that the financial position of the Company was fragile. This position had not changed even at the time of registration of all the three further charges. While an argument put up by the Defendants is that two of the charges were taken up where the Company simply stood surety for other borrowers and it did not endanger the Company, is it not a truism that a surety can be called upon to meet the obligation of the principal borrower in the event of default? And it would not matter if the security was to cover old borrowings that predated the Notices because the obligation on the Company was placed on the Company on the date the further Charges were registered. And in respect to the third further charge of Kshs 100,000,000, it bears repeating, that no sufficient explanation was given as to why it was taken up.**
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> **32. One other feature of these arrangements may call for further inquiry. The Bank has sanctioned the sale of the suit property at Kshs. 730,000,000/- to DPL Festive Limited. The 2nd, 3rd and 4th Defendants think this to be a good bargain because the market price stands at Kshs. 900,000,000/-. There is therefore some consensus that the market price of the suit property could be Kshs 900,000,000/-. Before the registration of the 3 further charges, the property was charged to a total sum of Kshs. 330,000,000 plus USD 2,000,000/-. This was within the value of the property. The three further charges aggregate to a sum of Kshs. 1,120,000,000/- which by themselves surpass the value of the property. This of course may be well explained by the Defendants but it seems that the propriety of the arrangements should be interrogated because they were made against the backdrop that the owner of the property was already technically insolvent.**
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> **33. The conclusion I reach is that the allegation that these arrangements imperils the Company and its assets is not a trifle and a suit brought to protect the property of the Company is a suit brought for the benefit of the Company. It is also a suit in respect of which a cause of action vests in the Company."**

20. Yet it helps to bear in mind that the running theme of the action is that the Defendants (and more so the Bank, perhaps) are guilty of reckless lending. Indeed the Plaintiff opens its written submissions by declaring:-

> **"The subject matter of this suit is reckless lending."**

21. That said, the Plaintiff's case can only draw limited inspiration from the Court's earlier finding that the cause of action which revealed the possibility of recklessness lending was not frivolous. This is because not the entire of the debt of Morris is associated with the alleged reckless lending. In their submissions, the 2nd, 3rd and 4th Defendants were quick to point out that there is an admitted debt of Kshs.330,000,000 and USD 2,000,000.

22. In regard to that debt, the Plaintiff pleads:-

"(11) Whereas Marigu Investment Limited is aware of a meeting of the Plaintiff's directors at which it was resolved to borrow the Kshs.400,000,000/= and USD 2,000,000/=, it does not know how the money was disbursed as attempts to get the supporting documents from the Defendants have been unsuccessful. To the Plaintiff's knowledge, the said amount, if disbursed, was not used for the benefit of the Plaintiff. Consequently, before the hearing of the suit, the Plaintiff will seek for orders compelling the Defendants to avail the documents."

23. Other than raising the issue that the loan may not have been used for the benefit of Morris, the Plaintiff does not provide the slightest of evidence in support of that allegation. Again, in regard to this admitted debt, the Plaintiff does not dispute that Morris has been in default and that the Bank issued the Notices required by Sections 90(2) and 96(3) of the Land Act.

24. Morris offered the suit land as security for the debt it incurred and by charging it to a Bank made a promise that it would let go of the property in the event of default. The truth of the matter is that the suit property would have been liable for realization even in the absence of the additional facilities which have been characterized as reckless lending.

25. It has been submitted by the Plaintiff the suit property is the only landed property of Morris and that once sold then the company is as good as dead and so to allow the sale would be to cause irreparable damage to the company. I am afraid that the argument does not advance the Plaintiff's cause at all because Morris was well aware of the centrality of the suit property to its existence even at the time of charging it to borrow Kshs.400,000,000 and USD 2,000,000. A debt for which there is now default. The charged property cannot be any more the indispensable to the chargor at the point of default when it was not at the point money was advanced .

26. It being clear to this Court that there is no prima facie case made out to stop the Bank from proceeding with its statutory power of sale in respect to the debt accruing from the Kshs.330,000,000 and US 2,000,000, then there is no reason to injunct the Bank.

27. This Court reaches this conclusion well aware that the suit property is charged not only in respect to the admitted debt but also that impugned as reckless lending. So what should happen if the Bank was to successfully exercise its statutory power of sale? I would think that any amounts realized would have to be applied towards both the disputed debt and the controversial debt. Should the Plaintiff succeed in its action for reckless lending then it can seek a recovery from the Bank. Since the Plaintiff does not doubt (and has at least not said so) the ability of the Bank to meet any ultimate decree, then the balance of convenience lies in the Bank proceeding with its statutory right of realization as there is strong evidence, on the material before Court, that there is truly indebtedness on at least one portion of debt.

28. The Application of 12th September 2018 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st Day of September 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

Wilson holding brief for Musyoki for the Plaintiff.

Kisinga for the 1st Defendant.

Kiruri for the 2nd ,3rd and 4th Defendants