



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 26 OF 2020**

**BETWEEN**

**JAMES KIMANI MWANGI.....1<sup>ST</sup> PLAINTIFF**

**ANNE NYOKABI WAKANGU.....2<sup>ND</sup> PLAINTIFF**

**BOTH TRADING AS SWEPCO GENERAL AGENCIES**

**AND**

**KCB BANK KENYA LIMITED.....DEFENDANT**

**RULING**

**Introduction and background**

1. The Plaintiffs are the registered proprietors of LR No. 7752/152 and LR No. 7752/153 (House No. 54) situated in Loresho Estate within Nairobi (“the suit property”). In order to finance their business of importing and selling electrical merchandise in Kenya, they applied for and were granted various facilities by the Defendant (“the Bank”) as evidenced by agreements dated 12<sup>th</sup> September 2012, 27<sup>th</sup> March 2015 and 10<sup>th</sup> November 2016 for Kshs. 22,000,000.00, Kshs. 6,000,000.00 and Kshs. 38,000,000.00. The facilities were secured by a First Legal Charge dated 27<sup>th</sup> September 2012 and a Further Legal Charge dated 15<sup>th</sup> March 2015 over the suit property. The Bank advertised the suit properties for sale by public auction thus precipitating this suit.

**Plaintiffs’ Case**

2. The Plaintiffs’ case is set out in the Plaint dated 14<sup>th</sup> February 2020. They state that they have been good customers of the Bank and have settled previous facilities without any difficulty. They state that their business was affected negatively by a Government ban on imported electrical products in 2019. As a result of this ban some of their consignments were impounded thus affecting their ability to service the loans.

3. The thrust of the Plaintiffs’ case set out in the Plaint dated 14<sup>th</sup> February 2020 is that although they have been servicing their loan diligently and have so far paid the Bank Kshs. 35,000,000.00, they discovered that the Bank had been charging interest in an unreasonable manner and has been overloading its account with unjustified penalties. They accused the Bank of being negligent in the manner it managed their loan account with the intention of making it difficult for them to pay the loan and resorting to sell the suit property without offering them advice and assistance and the opportunity to restructure the facility in contravention of its own policies.

4. The Plaintiffs accused the Bank of violating the provisions of the *KCB Bank Kenya Limited Credit Manual* (“the Credit Manual”) and of its Credit Policy by, inter alia, failing to monitor the loan, offering them advice, visiting their premises and failing to work with the Plaintiffs to avoid default. They also stated that the Bank has not complied with **section 44** of the *Banking Act (Chapter 488 of the Laws of Kenya)* and has continued to charge interest on a non performing loan even when the cumulative interest is higher than the balance on the principal amount. Further, that the Bank has merged the balance of the principal together with interest in order for the whole amount to appear as principal and charge further interest on it.

5. Because of the alleged breached and unjustified charges, interest and penalties, the Plaintiffs seek the following reliefs in the Plaint:

- a) THAT an injunction do issue stopping the Defendant, their servants and agents or any other person on their behalf from selling the Plaintiffs' property LR NO. 7752/152 & 7752/153 (House No. 54) Kibagare Way.
- b) THAT the Defendant do work with the Plaintiffs to restructure the loan taking into account all circumstances in line with the Bank's Credit Policy and Credit Manual.
- c) THAT the Defendant do remove all the illegal penalties and interests.
- d) THAT the Defendant do waive the penalties and interests on the loan.
- e) THAT damages be awarded to the Plaintiffs,
- f) Costs of this suit be paid to the Defendant.
- g) Any other order deemed suitable in the circumstances of the case be made.

6. The Plaintiff was accompanied by a Notice of Motion dated 14<sup>th</sup> February 2020 made, *inter alia*, under **Order 40** of the **Civil Procedure Rules** seeking an injunction restraining the Bank from selling the suit property pending the hearing and determination of the suit. The application was supported by the 1<sup>st</sup> Plaintiff's affidavit sworn on 14<sup>th</sup> February 2020. When the first auction in February 2020 failed, the Bank threatened to sell the suit property once again causing the Plaintiffs to file another application for injunction dated 19<sup>th</sup> August 2020 supported by the 1<sup>st</sup> Plaintiff's affidavit sworn on the same date. Both depositions reiterated the facts in the plaint as I have outlined above and on the basis of the facts, the Plaintiffs submitted that they have made out a case for the grant of an injunction.

#### **Defendant's Case**

7. The Bank relies on the Statement of Defence dated 18<sup>th</sup> March 2020 and the replying affidavits of James Muriithi Mwaniki, its Assistant Manager Credit and Administration sworn on 7<sup>th</sup> July 2020 and 28<sup>th</sup> September 2020. The thrust of its case is that at the time of filing the defence, the Plaintiffs were still indebted to it and that it was entitled to exercise its statutory power of sale.

8. The Bank asserts that it acted in strict compliance with the relevant provisions of the **Land Act** in proceeding to sell the suit property. It states that by a letter dated 8<sup>th</sup> May 2019, it served upon the Plaintiffs a statutory notice pursuant to **section 90** of the **Land Act**. Thereafter and by a letter dated 11<sup>th</sup> September 2019, it served on the Plaintiffs a statutory notice under **section 96(2)** of the **Land Act**. By a letter dated 9<sup>th</sup> December 2019, the Bank through Leakey's Auctioneers served on the Plaintiffs a 45-day redemption notice and notification of sale under the **Auctioneers Act**. It further states that in compliance with **section 97(2)** of the **Land Act**, it undertook a forced valuation of the suit property through Interlink Real Estates Ltd who prepared a report dated 28<sup>th</sup> August 2019.

9. In response to the ground that the Bank violated its Credit Manual, the Bank states that the Credit Manual did not form part of the facility agreements and legal charges. It contends that on its own terms, it is an internal document intended to guide and support the lending process within the Bank and is not binding on third parties. The Bank further stated that it charged interest rates in accordance with the express terms and condition of the loan agreements and legal charges executed by the Plaintiffs.

10. The Bank urged that the Plaintiffs have not met the conditions for the grant of an interlocutory injunction hence the applications should be dismissed.

#### **Applicable principles and issues for determination**

11. The parties filed written submissions which they agreed the court should consider. It is common ground that the three requirements that the Plaintiffs have to satisfy in order to obtain an injunction were settled in **Giella v Cassman Brown [1973] EA 348**. The court held that the plaintiff must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in its favour.

12. In **Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR** the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in **Giella v Cassman Brown (Supra)**. It further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if the applicant does not establish a *prima facie* case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.

13. As to what constitutes a prima facie case, the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR** explained that it is, "a case in 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 by the opposite party to call for an explanation or rebuttal from the latter." I would only add that prima facie case with a probability of success proceeds from what the Plaintiff has pleaded in the plaint.

14. The fact that the Plaintiffs were advanced money is neither disputed nor is the fact that they are indebted to the Bank. From the Plaintiff, the Plaintiffs have raised the following issues which if established, would constitute a prima facie case;

- (a) Whether the Bank has mismanaged the loan account.

- (b) Whether the Bank has complied with its internal credit policies.
- (c) Whether the Bank is entitled to exercise the statutory power of sale.

#### ***Whether the Bank mismanaged the loan account***

15. The Plaintiffs submit that the Bank has not only mismanaged the loan account but has also failed to appropriately credit the account hence burdening the Plaintiffs with wrong figures which it has not explained to the Plaintiffs. They have also accused the Bank of wrongly calculating and applying interest on the account. The Plaintiffs relied on the case of ***Scholastica Nyaguthii Muturi v Housing Finance Co. of Kenya Limited and Another [2017] eKLR*** where the court observed that:

*[78] ..... A court of law cannot determine issues of accounts based on guesswork, and any bank which fails to keep proper records of account cannot make a calculable claim against a customer. Banks must keep proper records of account. It is on the basis of such records that a claim for or against a bank can be determined. Since between the bank and the borrower it is the bank who is obligated to keep proper records and to avail statements of account, a bank which cannot avail proper records of account will be disqualified from making any claims against a borrower and would be hard put to discharge any such claims by a borrower.*

16. The Plaintiffs also complained that the Bank has not complied with **section 44** of the **Banking Act** as it continued to charge interest on a non-performing loan even when the cumulative interest is now higher than the principal.

17. The Bank denied the Plaintiffs allegations and submitted that the interest and penalties it charged were expressly provided for in the facility letter and loan charges. It also asserted that the Plaintiffs' claim lacked particulars.

18. The 1<sup>st</sup> Plaintiff has attached the Plaintiffs' statement of account running from 1<sup>st</sup> October 2016 to 13<sup>th</sup> January 2020. The Plaintiffs have not shown or pointed out which entries amounted to unjustified penalties or interest. They have not demonstrated how the interest charged on the account violated **section 44** of the **Banking Act** which provides that, "No institution shall increase its rate of banking or other charges except with the prior approval of the Minister." The Plaintiffs have also not shown how the aforesaid provision was violated in respect to them to enable the court consider relief.

19. It is therefore difficult for the court to evaluate or confirm the veracity of the Plaintiffs' allegation. Further, and in respect of the Bank statements of account, **section 176** of the **Evidence Act** creates a presumption in favour of the Bank as follows:

*176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.*

20. Just like the court in ***Scholastica Nyaguthii Muturi v Housing Finance Co. of Kenya Limited and Another (Supra)***, where the Court stated that it cannot determine the issue of account on the basis of guesswork, it is improper for the Plaintiff to throw a statement of account at the court and expect the court to divine from the figures what it seeks without setting out full particulars in support of its case. It is only upon establishing that there have been variations in the interest rates and charges from those provided by the facility agreement and charge documents, that the Bank will be called upon to provide justification of its actions (see ***Margaret Njeri Muiruri v Bank of Baroda NRB CA Civil Appeal No. 282 of 2004 [2014] eKLR*** and ***Samuel Ndiba Kihara and Another v Housing Finance Company of Kenya Ltd and Others HC COMM No. 638 of 2006 [2018] eKLR***). The Plaintiffs have not discharged the burden placed on them to show that entries in those account are contrary to the facility agreements and charges.

#### ***Whether the Bank complied with its Credit Manual***

21. The Plaintiffs grounded their case on the fact that the Bank failed to comply with the ***KCB Bank Kenya Limited Credit Manual*** and its credit policies. On this issue I agree with Bank's contention that the parties' relationship is governed by the terms set out in the facility agreement and legal charges and not the Credit Manual which clearly states that, "This Manual is strictly an internal document and intended to support the lending process for Business and Credit Staff within KCB Bank Kenya Limited. It is not to be distributed to outside parties without due authorization."

22. The Plaintiffs have not shown that the Credit Manual was incorporated into the terms of their relationship with the Bank.

#### ***Whether the Bank is entitled to sell the suit property***

23. In their written submissions, the Plaintiffs have submitted that they were never issued with the required statutory notices under the **Land Act**. They further contended that in view of the fact that the sale scheduled for February 2020 had aborted, the Bank must issue a fresh statutory notice as any previous notice, if there was, has been spent. They accused the Bank of failing to carry out a proper forced sale valuation of the suit property. Finally, they submitted that the suit property is their family home which should not be sold as they will suffer irreparable damage.

24. I have read and re-read the Complaint and I find that all matters raised in regard to the sale of the suit property have not been pleaded in the Complaint. To make matters worse, the issues were raised not in the Complaint or supporting affidavit but in the written submissions. It is trite law that parties are bound by their pleadings (see ***Dakianga Distributors (K) Limited v Kenya Seed Company Limited KSM CA Civil Appeal No. 168 of 2011 [2015]eKLR***). A prima facie case with a probability of success can only be founded on what is pleaded in the complaint and unless amended the court cannot consider matters outside the confines of the pleading to determine whether a prima facie case has been made.

25. While the Bank proceeded to demonstrate that its statutory power of sale had crystallised and that it proceeded in accordance with the provisions of the **Land Act**, I decline to proceed along an inquiry which is not supported by the Plaintiff.

### ***Negotiations***

26. As I understand, the Plaintiffs, by a letter dated 9<sup>th</sup> July 2020, made a plea to the Bank to allow them to dispose of another property in order to liquidate part of the debt. The Bank responded by a letter dated 9<sup>th</sup> July 2020 allowing the Plaintiffs to sell the property on condition that the proceeds of sale, amounting to about Kshs. 15,000,000.00, would be channeled through the Bank. The Plaintiffs complained that despite this, the Bank proceeded to instruct its auctioneers causing them to file the second application.

27. In response to that position, the Bank stated that payment from the proposed sale of the property would only reduce indebtedness as the Plaintiffs' account stood at Kshs. 62,960,256.02 as at 10<sup>th</sup> September 2020. It also stated that despite accepting the Plaintiffs' proposal, no step was taken to redeem the loan.

28. This position confirms the Plaintiffs' indebtedness and in the absence of an agreement on the terms of a settlement or agreement, this court cannot intervene by restraining the Bank from exercising its statutory power of sale.

### **Conclusion**

29. I find and hold that the Plaintiffs have not established a prima facie case with a probability of success on the issues pleaded in the plaint. In light of the **Nguruman Case (Supra)**, this marks the end of the inquiry.

### **Disposition**

30. The Notices of Motion dated 14<sup>th</sup> February 2020 and 25<sup>th</sup> August 2020 are now dismissed with costs to the Defendant. The interim orders in force are discharged.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of NOVEMBER 2020.**

**D. S. MAJANJA**

### **JUDGE**

Court of Assistant: Mr M. Onyango

Ms Hamba instructed by John Ogada and Company Advocates for the Plaintiffs.

Mr Wekesa instructed by Kamotho Maiyo and Mbatia Advocates for the Defendant.