



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. E092 OF 2020

BETWEEN

AUTOFINE LIMITED1ST PLAINTIFF

PENINAH NJERI NDUATI.....2ND PLAINTIFF

JULIA MWIHAKI KINANDU3RD PLAINTIFF

AND

EQUITY BANK LIMITED.....DEFENDANT

RULING

Introduction and Background

1. The basic facts underlying this dispute are common cause. By a Facility Letter dated 12th June 2015, the Defendant (“the Bank”) extended a credit facility to the 1st Plaintiff (“the Company”) to the tune of Kshs. 72,000,000/- which was subdivided into four facilities (“the Facility”) as follows: *Facility I* – an invoice discounting facility for Kshs. 20,000,000.00, *Facility II* – Business Overdraft Enhancement of Kshs. 5,000,000.00, *Facility III*- Business Loan of Kshs. 37,000,000.00 and *Facility IV* – Asset Finance of Kshs. 10,000,000.00.

2. The Facility was secured by personal guarantees and indemnities of the Directors supported by charge over property LR No. 36/III/1028 in the name of the 2nd Plaintiff, Peninah Njeri Nduati and RUIRU/KIU BLOCK 3/538 in the name of the 3rd Plaintiff, Julia Mwihaki Kinandu (“the suit properties”); a Debenture over all the assets of the Company; a lien and letter of set-off over Fixed deposit of Kshs. 1,100,000/- and Kshs. 500,000/- held in the Company’s accounts; and a Chattels Mortgage for Kshs. 2,000,000/- over motor vehicles KBG 289 and KAY 384N

3. The Bank claimed that the Company defaulted in its obligations. It initiated the process of exercising its statutory power of sale in respect of the suit properties thus precipitating this suit and the application under consideration.

The Application

4. What is now before the court is the Plaintiffs’ Amended Notice of Motion dated 20th November 2020 brought, inter alia, under **Order 51 Rule, 1** of the **Civil Procedure Rules, sections 1A, 1B, 3A and 80** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)**. The Plaintiffs’ seek an injunction to restrain the Bank from selling the suit properties in exercise of its statutory power of sale pending hearing and determination of the suit. They also seek an injunction prohibiting the Bank from referring them to the Kenya Credit Reference Bureau (“the CRB”) for adverse listing.

5. The Company filed the original Notice of Motion dated 18th March 2020 supported by the affidavits of its Director, Thomas Nduati Kinandua, sworn on 18th March 2020 and 13th October 2020 respectively. When the Plaint was amended to join the 2nd and 3rd Plaintiffs, the Notice of Motion was also amended. The Amended Notice of Motion is supported by the affidavit of Thomas Nduati Kinandua sworn on 20th November 2020. The Bank opposed the application through Grounds of Opposition dated 16th September 2020 and the replying affidavit of

its Credit Manager, Industrial Area Branch, James Kiriri, sworn on the same date. The application was canvassed by brief oral and written submissions.

The Plaintiffs' Case

6. The Plaintiffs' case is set out in the Amended Complaint and it is that the Bank failed to disburse the required amount under *Facility IV* to enable the Company purchase equipment necessary for running its business. As a result of the Bank's failure, negligence and or refusal to disburse the facility, the Plaintiffs claim that the Company used its capital to purchase the essentials thus crippling its business. The Plaintiffs seek several reliefs among them an injunction restraining the Bank from exercising its statutory power of sale in respect of the suit properties, general damages and special damages amounting to Kshs. 727,662,376.00 due to loss of business due to lack of financing by the Bank.

7. The Plaintiffs state that it was a term of *Facility IV* that it would be available, "For the purchase of new machinery on a need basis." In line with the facility, the Company identified a *Perkins* Generator and paid a deposit of € 1,005 to Famiar Generating Systems Limited ("Famiar"). By a letter dated 11th January 2016, it requested the Bank to pay the balance of € 16,000 under *Facility IV*. Upon receipt of the request, the Bank wrote to Famiar a Letter of Notification dated 3rd February 2016 indicating that it had agreed to finance the purchase of the generator on terms, inter alia, that the Company would top up the deposit. The Company proceeded to top up the deposit by paying Kshs. 100,000.00 to Famiar.

8. The Plaintiffs complain that despite the Company complying with the terms of *Facility IV*, the Bank failed to disburse the balance of € 11,200 forcing the Company to forfeit the deposit and installation charges paid to Famiar. Ultimately, the purchase failed and Famiar had to sell the generator. Although, the Company sourced a second generator, it accused the Bank of failing to pay for it causing the Company to forfeit the deposit.

9. The Company further states that between January and February 2016 and by letters dated 21st January 2016, 5th January 2016 and 27th January 2016, it requested the Bank to draw on *Facility IV* in order to purchase equipment from several companies; Amity Equipment, Dreamcoat Automotive Refinishing products, Parts Solutions EA Limited, Nairobi Power Tools Limited, Toolcrafts Limited, Toolcrafts Limited, Machinery Tools Limited, Isolutions Associates and Pipe Manufacturers Limited. Despite these requests, the Plaintiffs state that the Bank refused to disburse the funds.

10. The Plaintiffs also complain that in November 2016, the Bank failed to disburse payment upon request by the Company for a lorry; registration KBU 985G it had purchased at an auction set up by the Bank yet it had paid the requisite deposit. This caused the Company to forfeit its deposit.

11. The Plaintiffs state that based on the undertakings given by the Bank to honour its obligations under *Facility IV*, it proceeded to expand its business. Following failure by the Bank to honour its obligations, the Company's cash flow and ability to honour financial obligations was severely affected causing it irreparable injury. The Company states that the Bank refused its request to release the securities in order to enable it seek alternative and more favourable financing.

12. Counsel for the Plaintiffs submitted that if the orders sought in this matter are not granted and the suit properties preserved, the entire suit will be rendered nugatory and that the Company will suffer loss and damage for which it cannot be compensated by an award of damages. Counsel further submitted that had the Bank executed the Company's instructions to pay for the cost of equipment as agreed in the Letter of Offer dated 12th June 2015, the Company's business would still be a going concern with capacity to service the facilities. The Plaintiffs contend that the Bank breached its duty to the Company and as such it should not be made to bear any arising loss from its breach. It is the Plaintiffs' case that it is the Bank's breach that led to the Company's inability to repay the outstanding loan amount hence they are entitled to relief against the Bank.

The Bank's Reply

13. The Bank does not dispute that the Company, by a letter dated 11th January 2016, applied for disbursement under *Facility IV* for purchase of a generator from Famiar. The Bank issued a Letter of Notification of Funding dated 3rd February 2016 to Famiar copied to the Company agreeing to finance the Company but subject to the following conditions set out in the letter:

- a. That the Company pays part of the purchase price to the tune of € 4,800
- b. That the Company signs a Letter of offer within 30 days
- c. That the Company submits all the necessary documents as set out in the said Letter including: copy of importation document, copy of Machine Service Agreement, copy of delivery note, Certificate of Guarantee, Original final invoice with clear Bank details and written confirmation from a reputable insurance company acceptable to the Bank
- d. That the notification would lapse within 90 days

14. The Bank contends that the Company disregarded the terms of the Notification of Funding by failing to sign the Letter of Offer within 30 days, depositing the money with the seller after the lapse of 90 days, failing to submit all the necessary documentation as stipulated and failing to comply with the terms of notification within 90 days as stipulated in the Letter of Notification. As result non-compliance with the terms of the Notification, the Bank could not disburse the funds requested.

15. The Bank further stated that at the time, the Company was already in default and that to date it is indebted to the tune of Kshs.

28,077,069.89 as at 5th September 2020. It adds that despite several reminders demanding settlement of the outstanding loan arrears, the Company has failed to settle the arrears. The Bank also states that the Company made numerous commitments to pay the outstanding amount but failed to honour them.

16. Following default, the Bank stated that it issued to the Plaintiffs, the required statutory notices under **section 90** of the *Land Act* evincing its intention to sell the suit properties in exercise of its statutory power of sale. It also submitted that as the Company has defaulted in loan repayments, it is entitled refer the Plaintiffs to the CRB in accordance with the law

17. Counsel for the Bank submitted that *Facility IV* was to be sanctioned on need basis but subject to the Company complying with the terms of the Letter of Offer dated 12th June 2015 which terms the Company failed to comply with. The Bank also contended that it was untenable to proceed with *Facility IV* since the Company was already in arrears.

Whether the court ought to grant the injunctive orders

18. Although the counsel for the Defendant raised several technical objections to the application, I will determine the application on substance in the interests of justice. The substantial issue for resolution is whether I should grant an injunction to restrain the Bank from selling the suit properties in exercise of its statutory power of sale.

19. The principles upon which the court is required to apply in determining whether it should grant an injunction are not in dispute. 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 settled principles in *Giella v Cassman Brown [1973] EA 358* as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the 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.

20. As to what constituted 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.” The court must determine a prima facie based on the four corners of the pleadings before the court.

21. In this case, the Bank seeks to exercise its statutory power of sale. The suit properties are owned by the 2nd and 3rd Plaintiffs who have charged them to the Bank in order guarantee the Facility to the Company. From the facts I have outlined above, the Company’s contention is that the Bank failed to disburse funds due under *Facility IV*. It however admits that it indebted to the Bank under the Facility. Under the respective guarantees and charge documents, the 2nd and 3rd Plaintiffs’ obligation is to secure the Company’s indebtedness and other obligations to the Bank.

22. Before amendment of the Plaint to include the 2nd and 3rd Plaintiffs, Counsel for the Bank rightly pointed out that the chargors were the proper parties to sue the Bank as it is only a chargor who can complain that the statutory power of sale is being exercised unlawfully, wrongfully or oppressively since it is only the chargor who has a registered interest in the land (see *Nairobi Mamba Village v National Bank of Kenya Ltd [2002] 1 EA 197, Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd CA Nai No 349 of 2003 (UR) and Kenya Commercial Finance Company Limited v Afraha Education Society [2001] 1 EA 86*). It follows that in order for the Plaintiffs to succeed in obtaining an injunction, they must demonstrate how the Bank violated or infringed the rights vested in the chargors. Thus, the allegations of failure by the Bank to disburse *Facility IV* upon request by the Company do not concern the chargors or implicate the manner in which the Bank exercises its statutory power of sale.

23. The Company has admitted that it is indebted to the Bank although asserts that its inability to pay the outstanding loan amount is as a result of the Bank’s breach of the terms of the *Facility IV*. I hold that as a result of the Company’s indebtedness, the Bank was entitled to call on the 2nd and 3rd Plaintiffs as guarantors to pay the debt and upon failure to comply with the demand to take steps to exercise its statutory power of sale.

24. In order to exercise its statutory power of sale, the Bank must issue a notice under **section 90** of the *Land Act* when the chargor defaults in any of its obligations under the charge. Such obligations include payment of interest or any other periodic payment or any part thereof due under the charge. If the chargor does not comply with the demand within 90 days after service of the notice, the chargee may proceed to sell the charged property. It is at this point that it is said the statutory power of sale has crystallised. Upon crystallization of the power of sale, the chargee is required to issue and serve on the chargor a 40-day notice to sell under **section 96** of the *Land Act*.

25. I have read and re-read the Amended Plaint, the Plaintiffs do not make any allegation against the Bank for violating the 2nd and 3rd Plaintiffs’ right to redeem the suit properties at any time. The Plaintiffs do not allege that demand letters were not sent to the 2nd and 3rd Defendant’s as guarantors. They do not allege that the Bank has not issued the required notices under the provisions of **section 90** of the

Land Act or if it has, that the notices are unlawful, oppressive or illegal.

26. Since the fact of default and indebtedness by the Company is not denied and has been expressly admitted by the Company, there is no reason why the Bank should be restrained from reporting default and indebtedness to the CRB. I do not find any basis for restraining the Bank from reporting the Plaintiffs' default to the CRB.

27. As the 2nd and 3rd Plaintiffs' case against the Bank is not supported by the Amended Complaint and the evidence, I find and hold that the Plaintiffs have failed to establish a prima facie case with a probability of success against the Bank. Following the *dicta* in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra)***, once an applicant fails to establish a prima facie case with a probability of success, the inquiry comes to an end.

Disposition

28. The Notice of Motion dated 18th March 2020 as amended on 20th November 2020 is dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 23rd day of DECEMBER 2020.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Nekesa instructed by Jackline P. A. Omolo and Company Advocates for the Plaintiff.

Mr Okech instructed by Mwaura and Wachira Advocates for the Defendant.