



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 69 OF 2017

JUJA COFFEE EXPORTERS LTDPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

1. For the court's determination are two applications by both the plaintiff as well as the defendant. The plaintiff application seek a temporary injunction pending the hearing and determination of the suit while the defendants applications prays that the *ex-perte interim* orders issued to the plaintiffs on the 12/10/2017 be set aside. The two notices of motion are dated 9/10/2017 and 18/10/2017 respectively.

2. By court orders of 9/11/2017, it was directed that the two applications be heard together. That direction was informed by the fact that a decision on the plaintiff's application dated 9/10/2017, either way would in effect determine the Defendant's application. This is because, if the plaintiff's application succeeds the interim orders would be confirmed and would cease being *ex-perte* while on the other side if the application fails, the same would stand dismissed with the inevitable consequence that any orders issued upon it would go with the dismissal.

3. In that scheme of things, I will proceed to consider the application for injunction and treat the application for setting aside as an opposition to it. However before then it is important to set out, in summary, the facts said to ground the two applications.

Applications dated 9/10/2017

4. The notice of motion by the defendant seeks in the main an order that pending the hearing and determination of the suit, there be granted to the plaintiff/applicant an order of temporary injunction directed at the defendant either by itself agent, employees and servants from, selling, transferring or in any other way interfering with the plaintiffs ownership of all and any of the five (5) parcels of land being:-

- i. Mombasa/Block 1/146
- ii. Mombasa/Block 1/167
- iii. Mombasa/Block 1/190
- iv. Mombasa/Block 1/198
- v. MN/1/52 08

5. The same application also seeks an order that the Defendant be ordered and compelled to provide the plaintiff and the court with certified copies of the documents to allow the plaintiff to conduct an inspection of the documents listed in a scheduled dated 9/10/2017. The reasons advance to ground the application are that the plaintiff being the registered owner, as a lease, it came to learn that the defendant had initiated steps to sell the property pursuant to an alleged statutory power of sale to recover a disclosed sum of USD 36,094,495 and Kshs.12,259,739.50 extended to the plaintiff pursuant to two letters of offer and secured by legal charges registered over the suit property and duly registered. On the basis of such information the plaintiff filed with the plaint as well as a notice of motion dated 19/4/2017 challenging the sale on the basis that it had not been served with the mandatory statutory notices but the said application was withdrawn after the defendant filed a Replying Affidavit.

6. It is that Replying Affidavit the plaintiff now says, it discovered what it deems an illegality, fraud, impropriety and an outright unreasonableness in the defendant's endeavor to exercise its statutory power of sale. On the disclosure of such information the plaintiff sought and obtained a forensic review of the dealing between the parties which revealed that a large sum of USD 26,147,156 was credited to

the account and withdrawn by some undisclosed persons the same day and that just five days after the draw-down, a statutory notice was served alleging default. On those facts, the plaintiff reads fraud, illegality or impropriety committed against it and therefore the demand for Kshs. 36, 095, 495.41 is to it illegal, fraudulent, improper and excessive and cannot form the basis of a valid statutory power of sale for which a prima facie case had been established in its favour. The plaintiff then attacks the notices issued to have been premature, that there was not current valuation of the property prior to advertisement to enable the value thereof be included to the notification of sale and that there was no discerned evidence of service of the notices. Those facts were repeated in the Affidavit of TAUHIDA SHEIKH SAID which then exhibited the documents relied on to support the plaintiffs' claims.

7. The documents included:

- i. Document of title to the suit property.
- ii. Advert for sale dated 2/10/2017.
- iii. The Notice of Motion dated 19/4/2017 and a notice of its withdrawal.
- iv. Replying affidavit by Fatuma Mohamed sworn on 26/5/2017.
- v. Forensic investigation report.
- vi. Charge sheets by which people from the employment of both parties have been charged withdrawal and forgery.
- vii. RTGS slips for payment of sum USD 1,827,885 by the plaintiffs customers into the account.

8. It was then pointed out that the fact that the plaintiff failed to comply with the courts order on grant of interim injunction should not be the basis to allow the defendant proceed with the sale fraught with illegality, fraud and impropriety.

9. With the leave of the court the plaintiff filed a supplementary affidavit on 18/6/2018 sworn by the same TAUHIDA SHEIKH SAID. That affidavit was intended to reiterate the averments in the Affidavit in support and to respond to the Replying Affidavit and also bring to light what the plaintiff considered the level of fraud it considered to keep emerging day by day. The new revelation emerge to be that according to the pleadings filed in Nairobi HCC No. 414 of 2017, the defendant is disclosed to have offered to take over plaintiff's liabilities to standard chartered Bank but the defendant only paid USD7,599,947 but declined to pay some USD 2,637,285.25 and Kshs.149,873,027.05 which fact the defendant has not disclosed to court herein.

10. For that reason, the pleadings filed in that suit were exhibited to prove that there was no taking over of any facilities but a mere fraudulent scheme. The affidavit in answer to the Replying Affidavit faults its deponent for failure to appreciate how the pre and post-shipment facilities operate then gives an explanation on the facilities based on what the defendant says in its web page with an emphasis that it is unfathomable that a pre or post-shipment facility would ever run into default. Reliance was then placed on the interim forensic report by the plaintiff's auditors which stated that their investigations revealed a credit balance of sum USD 3,394,511 which should be accounted for by the defendant.

11. It was then additionally contended that an inquiry for the Tea Brokers East Africa Ltd, the only body carrying out tea auctions in Kenya, revealed that the last time the plaintiff traded at the auction was in 2015 and therefore it is, in the words of the deponent, a serious possibility that the defendant just made up statements of accounts to justify its claims. On the impropriety allegedly disclosed in Nairobi CR C No. 1604/2017, it is acknowledge that the same does not touch on the defendants employees but the plaintiff implores the court to consider same to have happened here too as there had been sanctions imposed against the defendant's employees by the Capital Markets Authority and that it be deemed not farfetched that the USD Ksh.16,533,816 that was available as at 31/12/2014 was also embezzled by the defendants agents. On the admission made by the plaintiff in the withdrawn application, the plaintiff says such was out of lack of information but has since changed with the discovery of what it considers fraudulent dealings. Lastly on the disobedience of the interim injunctive orders, the plaintiff submitted that the same lapsed when the conditions were not met and cannot be available to be disobeyed. In considering the application I will take full regard to the facts and exhibits in the two affidavits.

12. For the defendant, the Application was opposed on the basis of two Replying Affidavits given by Fatuma Mohammed on 16/2/2018, further Replying Affidavit sworn by Eustus Nyaga on 14/9/2018 and the notice of motion dated 18/10/2017 seeking that the *ex-parte* interim orders of 12/10/2017 be varied, discharged and or set aside entirely.

13. It is to be noted that the Notice Of Motion by the defendant was never supported by any Affidavit hence it must be seen not to rely on any facts but pure points of law only. The point shown on the face of the application are that having filed a notice of motion together with the plaint and obtained an interim order which were subsequently extended and varied with a condition that the plaintiff deposits a sum of Kshs.100,000,000/= toward the reduction of the debt but the conditions was never fulfilled, the orders lapsed and the defendant was entitled to proceed with the realization scheduled for 9/10/2017 which was then stopped by orders issued on 12/10/2017. It was contended by the defendant that by withdrawal of the Notice of Motion dated 19/4/2017 the plaintiff was engaging the court in legal ingenuity to defeat and circumvent the orders of 13/7/2017 and thus an abuse of the court process. In effect the defendant faults the application dated 9/10/2017 for having been brought in a manner that is abusive of the court process.

14. Turning to the Replying Affidavit sworn by FATUMA MOHAMED the defendant takes the position that there is no basis in law and fact to merit the plaintiff being granted any of the orders sought. It is highlighted that in the plaint the indebtedness is admitted and all the plaintiff seeks is a chance to seek an amicable settlement. Emphasis is then placed on the fact that the plaintiff has refused to comply with court orders directing that it deposits Kshs.100,000,000/= as a condition for injunction. There is then reference to two letters by the plaintiff's former advocates calling for negotiations as evidence of admission and acknowledgment of the debt. Without much energy ,

however, it is enough and not preemptive to say this early that those letters having been done on a “without prejudice” basis are not admissible and will not be considered by this court in its determination.

15. On the merits the defendant pointed out to court the fact that the creation of the legal charges over the property is not in dispute as evidenced by the four bank facility letters and legal charges created and registered against the suit property with a clarification that the deponent of the plaintiffs Affidavit Mr. TAUHIDA TAHIR SHEIKH SAID executed the letters of facility and legal charges as a director of the plaintiff. It was then added that the securities having been perfected and facilities disbursed the plaintiff defaulted in repayment and the bank the resorted to its contractual rights to recover its debt by realization and as at 16/1/2018 the debt then stood at USD 44,086,934.05 and Kshs.12,296,289.49. The indebtedness was pointed out to be unequivocally admitted in the plaint, witness statement and Affidavits by Tauhida Tahir Sheikh Said. Notices for default pursuant to Land Act, 2012 and Auctioneers Act, were then exhibited with the certificates of postage as evidence of delivery. On the claim of fraud, illegality impropriety and unreasonableness, the plaintiff asserts that the same is disclosed by the forensic report, the defendant dismisses same and considers it replete with not only falsehood but also misleading information in that the report misapprehends the fact that as at 23/12/2015 the plaintiff account was already overdrawn in the sum of USD 26,342,488.20 hence it could not be true that the sum was drawn down the same day and withdrawn by unknown persons. There was then explanation offered on how the facility worked and letters of request and instructions to pay were exhibited to show that the plaintiff indeed enjoyed accommodation from the defendant. On that same sum shown to have been drawn down on 23/12/2015 the defendant offered an explanation that it was an effort by the bank to organize the plaintiff’s various accounts with it and bank statements of some 7 accounts were exhibited to demonstrate the efforts to re-organize loan account and that all sums paid on behalf of the plaintiff and its creditors were duly and accurately reflected in the current account.

16. On the allegations that impropriety and fraud had been disclosed by different persons being charged with criminal offences in both Nairobi and Mombasa, the defendant gave the explanation that in the said cases the bank was the complainant and that the complaint is that the accused persons were making entries that loans were being serviced when they were not and further that there was not correlation between the criminal cases and the plaintiff or its facilities with the bank because the cases do not question the plaintiff’s borrowings. It was therefore contended that the said criminal case were made reference to unfairly mislead and influence the mind of the court.

17. The allegations of lack of service and invalidity of the statutory notices were then strenuously contested and denied it being shown that the notices were issued on account of persistent default and that there was no prematurity in relation to the letter of offer dated 1/2/2016 because that letter was issued for purposes of securing an offshore borrowing by the plaintiff to pay the existing loan obligation due to the bank. The standby letter of credit was not an additional facility and was never actualized because the plaintiff did not avail a financier to take over the debt hence the bank was under no obligation to issue fresh notices of default. On the complainant that there were no current valuations of the property, it was asserted and shown that there were indeed valuations conducted in July 2017 in compliance with Rule II auctioneers rules. On invalidity of the charge owing to want of consent of Kenya Railways Corporation the defendant exhibited a search to show the charges were validly registered after Kenya Railways Corporation gave its consent. Based on the said facts and circumstances the defendant pleaded that the plaintiff should not get any favours in equity and law by being granted any orders but the application should be dismissed.

18. The other resistance to the application is to be found in the further replying affidavit sworn by Eustance Nyaga whose object was to respond to the supplementary affidavit and reiterate the contents of the Replying by Fatuma Mohammed and to assert that the current application deposits for the plaint and cannot thus be granted. It was then asserted that the deponent of the plaintiff’s affidavit executed the letter offers on behalf of the plaintiff and was thus port and parcel of the running of the affairs of the plaintiff and any allegations of fraud must be directed and left to be with the said deponent and her co-directors.

19. On allegations that all the financial facilities were taken out for Standard Chartered Bank Ltd the deponent sought to show that there could not have been a takeover became prior to 2015, the bank had already extended facilities to the plaintiff.

20. On whether or not money was indeed availed the deponent referred court to various letters of request and bank statement to show dates of draw down with explanation of change over from pre-shipping into post shipping facilities and how the same worked. Requests in various letters and compliance by payment through the accounts were emphasis at paragraph 17(vii) with evidence that there were requests to extend time for the payment of the facilities. The criminal cases at Nairobi and sanctions by capital markets authority were said to be irrelevant to the dispute before court.

21. Lastly on the prayer for production of documents, the deponent took the position that the plaintiff was the originator of some of the documents and that same documents have been exhibited in the Affidavits filed. That Affidavit exhibited to court banking facilities letters and a statement of defence filed in Nairobi HCC No. 414 of 2017 in which the Defendant herein admitted at paragraph 5 thereof that it and NIC Bank agreed to pay to advance to the plaintiff here the sum of USD 25,600,000/= out of which the defendants obligations was USD 7,600,000 which duly met.

22. After those Affidavits were filed and exchanged, parties filed written submissions. In canvassing the Application, the plaintiffs submissions were in two sets; submissions dated 18/6/2018 and further submissions dated 10/1/2019 together with two sets of lists of authorities dated 1/8/2018 and 10/1/2019. On its side the defendant also filed two sets of submissions both dated 12/10/2018 and expressed to distinctively relate and concern the two applications. The defendant’s submissions are bound together with the decided cases quoted and relied upon.

Determination

23. I have hand the benefit of reading the plaint, the Affidavits filed on both sides as well as the elaborate written submissions offered and highlighted orally in court. The voluminous nature of the papers filed and the sums in dispute notwithstanding, the dispute here is one straight forward one seeking the determination whether or not the court should grant to the plaintiff an injunction pending an determination of the suit. Such is governed by the now well established principles initially well laid down in East African in the case of ***Giella vs Casman Brown & Co. Ltd [1973] 358.***

24. Those principles settling the law have remained that; a plaintiff seeking to get and be granted a temporary injunction must establish a prima facie case with probabilities of success, must establish that he stands to suffer a loss irreparable by an award of damages if the injunction be refused and where the court is in doubt, it balances the convenience between the parties. In a later decision by the **Court of Appeal in *Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2019] eKLR***, the law was laid that the three prerequisite must be proved in a sequential manner underscoring the fact that the foundation of grant of temporary injunction is a prima facie case with probabilities of success.

24. The starting point and foundation of a suit is the initiating pleadings. In this case to discover what kind of a case the plaintiff presents, I am bound to look at the plaint, the witness statement and any documents filed therewith. Paragraph 12 of the plaint tells it all on how the plaintiff viewed the dispute between the parties. In it the plaintiff pleads:-

“It is true that the Plaintiff does owe the Defendant an outstanding amount but it is uncertain whether that amount is as claimed by the Plaintiff. The only way to cure this is by the Plaintiff and the Defendant entering into a negotiated Agreement on how to clear the outstanding amount”.

25. That paragraph is preceded with paragraphs 4 & 5 7 6 which assert that the face and contact of the plaintiff with the defendant was one AHMED TAHIR SHEIKDH SAID who was the primary decision maker and who died on 10/01/2017 and that it was reasonable that the defendant await representation of this estate to be raised so that a way forward be charted.

26. In the entire body of the plaint, there is no contest over the validity off the contract between the parties just as there is no contest that there is a debt outstanding for payment. What is softly contested is the service of statutory notice and the exact sum due. That position is fully reflected in the witness statement by plaintiff director, TAUHIDA TAHIR SAID who relies on a letter by the plaintiff’s former counsel dated 24/4/2017 which wholly admitting the debt and pleading for indulgence in time to enable put its affairs in order by taking of accounts and a meeting between the parties. On the basis of that pleading the plaintiff sought that the notification of sale be nullified for having been issued prematurely and an injunction pending consent settlement with the defendant be issued with an alternative prayer that the parties be ordered to negotiate.

27. That plaint formed the basis of the application dated 19/4/2017 which was supported by another Affidavit of TAUHIDA TAHIR SAID in which the validity of the contract and the existence of the debt were never questioned. That state of pleadings leaves the court with only one pertinent issue to resolve – was a valid statutory notice ever served?

28. The answer to that question is available in the plaintiffs own annexure in the Affidavit in support at pages 49 – 415- the Replying Affidavit of Fatuma Mohammed to the Notice of Motion dated 19/4/2017. At pages 312 to 324 there are the requisite notices issued and evidence of service by registered port including an Affidavit of Service sworn by one Joseph Mungai Gikonyo t/a Guram Auctioneers. Those documents have not been disputed at all but are relied upon by the plaintiff. From the pleadings and documents, it is not difficult to determine that the contract is acknowledge, the debt is equally acknowledge as much as the default and further that the requisite notices were duly served. With that determination I do not see any basis to doubt whether or not a prima facie case has been made out even if I get reminded that a prima facie case does not mean a case that must succeed. I hold that there is not a semblance of prima facie case shown in this matter.

29. Does it matter that the plaintiff in the application and submission has attributed against the defendant, fraud, illegality and unreasonable? I do not think so. Such do not matter nor count because parties are bound by their pleadings and not allowed to depart from the pleadings on record. In this case the contact of lending having been acknowledged, it is not and cannot be open to the plaintiff to depart from what it has pleaded in the plaint. The law says it is not permitted. The situation is compounded negatively for the plaintiff in that there is no fraud alleged against the defendant and pleaded as required under the law.

30. This being an interlocutory application in which I must refrain from making determinative statements on the merit of the case and taking into account that the parties may still resort to amendment of pleading, I refrain from saying more beyond the fact that no prima facie case had been demonstrated.

31. I have said herein before that prima facie case is the foundation upon which a determination of an application for a temporary injunction must be based. Where there is no prima facie case there is no benefit in considering the other requirements. The third reason I would not allow the application is that in law a temporary injunction must be grounded on some prospect of a permanent injunction being granted at the end of the case. In this matter the prayers by the plaintiff do not seek any permanent injunction. It would thus be an undeserved adventure to grant an injunction even if there had been disclosed a prima facie case in absence of a prayer for a permanent injunction.

32.The upshot is that the application dated 9/10/2017 lacks merit and I thus order it dismissed with costs to the defendant.

Dated and delivered at Mombasa this 11th day of April 2019.

P.J.O. OTIENO

JUDGE