



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 467 OF 2016

OCEANIC OIL LIMITED.....PLAINTIFF

-VERSUS-

STANDARD CHARTERED BANK KENYA LTD.....DEFENDANT

RULING

By a Notice of Motion Application dated 21st November 2016, pursuant to **Order 40, Rules 1 and 2** of the **Civil Procedure Rules 2010** and **Section 1A, 3A and 63(e)** of the **Civil Procedure Act** and all other enabling provisions of Law; the Plaintiff/Applicant sought orders;

a) That this Court issues a temporary Injunction order restraining the Defendant, whether by itself, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising, selling, disposing, alienating, transferring and/or in any other manner interfering with the Plaintiff's quiet possession, occupation and enjoyment of all those parcels of Land known as **Land Reference Number 209/136/65, maisonette number one (1) erected on Land Reference Number 3734/937, Title Number South Ugenya/Yiro/2835 and Title Number Uasin Gishu/Mile Thirteen Scheme/73** pending the hearing and determination of this application *inter-partes*.

b) That Court issues a temporary Injunction order restraining the Defendant, whether by itself, agents, or servants from doing any of the following acts, that is to say, commencing realization of security, exercising power of sale, advertising, selling, disposing, alienating, transferring and/or in any other manner interfering with the Plaintiff's quiet possession, occupation and enjoyment of all those parcels of Land known as **Land Reference Number 209/136/65, maisonette number one (1) erected on Land Reference Number 3734/937, Title Number South Ugenya/Yiro/2835 and Title Number Uasin Gishu/Mile Thirteen Scheme/73** pending the hearing and determination of this suit.

c) That costs of the application be borne by the Defendant/ Respondent.

The application is based on grounds;

a) That the Plaintiff obtained five loan facilities advanced by the Defendant and charged the suit properties in favour of the Defendant as securities.

b) That the Defendant went back on its promise and disbursed fewer amounts than the loan expected to be released, thus delaying the projects under construction from which the proceeds of

settling the loan accounts were to come from.

c) That without any notice to the Plaintiff, the Defendant has been increasing the rates of interest payable, thus making redemption practically impossible.

d) That the Defendant has purportedly sought to exercise its Statutory Power of Sale by sending demand letters giving the plaintiff three months notice despite the fact that the same has not arisen.

e) That the said demand letters were recalling the loan facilities in full instead of arrears, if any, which the Plaintiff denies owing.

f) That the Defendant has completely refused to furnish the Plaintiff with its Account Statements despite numerous requests, and therefore the Ksh 456, 677,508.40 the Defendant is demanding for is unaccounted for.

g) That the Plaintiff has all along been servicing the facilities and is not in any arrears as the Defendant alleges.

h) That the Defendant has recklessly and deliberately mismanaged the Plaintiff's Loan Accounts without due regard to proper banking regulations, and in an unlawful effort to cover up their own mess, have now started demanding payments of hefty sums of money intended to intimidate the Plaintiff.

i) That the Defendant stalled disbursements of the loan amounts midway through the construction projects without offering a valid explanation, and knowing very well as prudent and reasonable bankers would that it would, affect the repayment of the loan accounts, which now forms the basis of this suit.

j) That the Defendant caused the Plaintiff to execute numerous other letters of offer, which were always done at the bank premises and whose copies were never released to the Plaintiff, and then unilaterally altered terms of the facilities.

k) That the three months notice issued by the Defendant on 22nd August 2016 lapsed on 22nd November 2016 and there is therefore a real and imminent danger of the Defendant proceeding with its unlawful exercise of its statutory power of sale by dealing with the suit properties to the detriment of the Plaintiff's interests.

l) That unless the Defendant is restrained by this Honourable Court, the Plaintiff/Applicant will suffer irreparable loss and damage that cannot be compensated by any award of damages, and it would only be in the interest of justice and fairness that injunctive orders be made to protect the Plaintiff pending the determination of the real issues in this matter.

The Defendant by the Replying Affidavit through the Account Manager, Group Special Assets Management and bundle of documents attached, she stated as follows;

The Defendant advanced various facilities to the Plaintiff from time to time as follows;

a) Letter of 25th August 2011 pg 1-10 of the bundle Ksh 40,000,000/=

b) Letter of 1st February 2012 pg 11-20 of the bundle ; the letter enhanced overdraft facility from Ksh 20,000,000/= - 30,000,000/- and export invoice financing facility from Ksh 40,000,000/- -Ksh 60,000,000/-

c) Letter of 31st May 2012 pg 21-31of the bundle; the letter increased the export invoice financing

facility from Ksh 60,000,000/- to Ksh 100,000,000/-. The plaintiff was to offer a new asset backed finance facility for Ksh 31,400,000/-

d) Letter of 19th July 2012 Pg 32-42 of the bundle. The letter issued a new mortgage loan – residential facility of Ksh 31,400,000/-

e) The letter of 21st March 2013 Pg 43-53 is on annual review of the existing facilities.

f) The Letter of 28th February 2014 Pg 54 – 66 of the bundle offered a new term loan of Ksh 7,112,080/=

g) The letter of 19th February 2015 pg 67-81 was to enhance existing facilities from Ksh 100,000,000/- to Ksh 180,000,000/- and to offer 2 new mortgage loans of Ksh 150,000,000/- and Ksh 75,000,000/- at pg 70

h) Letter of 31st August 2015 at pg 82-95 to 108 of the bundle. This letter increased the export invoice financing facility from Ksh 180,000,000/- to Ksh 230,000,000/-

The defendant deponed that the Plaintiff's claim that the letters of offer were executed under duress is unjustified no particulars of allegations of duress were provided.

The Plaintiff had secured the facilities advanced by charges over various properties;

a) LR no 209/136/65 charge dated 8th april 2011 Pg 109 -127 of the bundle

b) Maisinete Number LR No 3734/937 –Charge dated 23rd October 2012 Pg 137- 154 of the bundle

c) Uasin Gishu /Mile Thirteen Scheme 75- Charge dated 13th April 2015 Pg 172-188 of the bundle

d) Title Number South Ugenya/Yiro/2835 – Charge dated 2nd April 2015 Pg 189-205 of the bundle

The allegation that the Plaintiff was never supplied with copies of executed registered charge documents is unfounded. It was made for the 1st time in these proceedings and no correspondence seeking the same has been attached. Since filing these proceedings when the issue was raised for the 1st time, the Defendant's advocates on record supplied these copies vide a letter dated 18th April 2017.

The allegation that the Defendant failed to disburse the agreed facilities is made without basis. The Plaintiff failed to divulge the particulars to establish the claim.

The allegation that the Plaintiff failed to provide statements of accounts is not substantiated, there is no correspondence by the Plaintiff requesting for statements of accounts. Copies of statements of accounts were always availed to the Plaintiff as shown at Pg 271-288 of the bundle.

The Defendant alleged that the interest charged was provided for in the Charge documents.

PLAINTIFF'S/APPLICANT'S SUBMISSIONS

The Plaintiff/Applicant submitted that it is the legal and the equitable owner of all those parcels of land known as Land reference No. 209/136/65, maisonette number one (1) erected on Land Reference number 3734/937, Title number South Ugenya/Yiro/2835 and title number Uasin Gishu/Mile Thirteen Scheme/73.

That sometimes in the year 2011, the Defendant/Respondent expressed an offer to extend and approve five credit facilities amounting to Ksh 335,188,620/- to the Plaintiff/Applicant as follows: For the first facility it was offered Ksh 63,263,950/- for the second facility the offer was Ksh 17,678,100/- Ksh 29,246,570/- for the third facility, Ksh 150,000,000/- for the fourth facility and Ksh 75,000,000/- for the fifth facility.

That the right formulation of the principles considered by court on determining whether a temporary injunction should be issued was set out in the celebrated case of **Giella –vs- Cassman Brown & Co. Ltd [1973]EA 358;**

“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 injury, which would not be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

The same principle were held in the case of **Assanand –vs- Pettitt (1989)eKLR,** where the court stated that;

“the object of Temporary Injunction is to keep things in status quo so that if at the hearing the Plaintiffs obtain a judgment in their favour the Defendants will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.”

Further that the Respondent had been unable to justify at Interlocutory stage their increased interest rates and ignored the fact that the Applicant had been servicing the loan as early as 2011 and thus the amount claimed was illegal. This was reiterated in the case of **Margaret Njeri Muiruri –vs- Bank of Baroda (Kenya) Limited [2014]eKLR,** where the court of appeal judges, Warsame, Waki and Gathembu held that;

“In the appeal before us, it was the respondent bank which fell within section 112 and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because Section 44 of the Banking Act places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from the minister?”

To illustrate this point, we find persuasive authority in the High Court case of John Gatu Nderitu –vs- Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 of 2001) where Sergon J. found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with section 44 of the Banking Act. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal.” [emphasis Added]

DEFENDANT’S WRITTEN SUBMISSIONS

1. Should this suit be dismissed for failure to serve Summons to enter appearance?

It was the Defendant’s submission that this case was filed on 21st November 2016. The summons to enter appearance were to be issued not more than **30 days** from the date of filing suit under **Order 5 Rule 1 (2) of the Civil procedure Rules, 2010 orders 5 Rule 5 1(2) of the Civil Procedure Rules, 2010** is couched in mandatory terms. The time for the Plaintiff to collect the summons to enter appearance therefore started running 30 days after this suit was filed.

2. Has the Plaintiff satisfied the test for the grant of an interlocutory injunction?

The Court of Appeal considered similar cases to the present case on numerous occasions. These include;

i) *Habib Bank A. C. Zurich –vs- Pop in Kenya Limited and Others [1995]EKLR*, where it held;

“...in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage.”

ii) *Apabhai Punambhai Patel –vs- Njeri Ngiru Civil Appeal No. 18 of 1977*, where it held;

“...it seems clear that the injunction should not have been continued as there was no allegation that irreparable damage would be occasioned should the sale take place. On the face of it, damages would be sufficient compensation should the power of sale be found to have been improperly exercised.”

iii) *Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others[2003] ELKR*, where it held that a dispute as to the amounts due was not good enough reason to halt the realization process.

In *Desai & others –vs- Fina Bank Limited[2004] 2 EA 46*, the Court followed the position that has been established by the Court of Appeal and held that;

“in any event it is now settled judicial precedent, that a dispute as to the amount owing is not a basis for injunction to restrain a mortgagee from the exercise of its statutory power of sale”

The Plaintiff’s submissions on the alleged breach of **Section 44 of the Banking Act** failed to take into consideration the provisions of **Section 52 (1) Banking Act** which provides;

“For the avoidance of doubt , no contravention of the provisions of this Act or the Central Bank of Kenya (Cap 491) shall not affect or invalidate in any way any contractual obligation between the institution and any other person.”

In *David Mburu Githere vs Jamii Bora Bank Limited [2017] eKLR* it was held;

“The Plaintiffs herein, as submitted by the Defendant wilfully gave the suit property as security and as such it became a commodity for sale and it is therefore subject of sale in case of default. Further, even if the Court was to find in favour of the Plaintiffs at the final determination of the suit, damages would be an adequate remedy. The Plaintiffs thus can find recourse in Section 99(4) of the Land Act which provides that;

A person prejudiced by an unauthorised improper exercise of the power of sale shall have a remedy in damages against the person exercising the power.”

In *Priscillah Krobought Grant vs Kenya Commercial Bank* also relied on Section 99 (4) of the Land Act.

In *Andrew Muriuki Wanjohi vs Equity Building Society Ltd vs 2 others [2006] eKLR* the Court considered the real risk was that the charged properties would not fetch a sum sufficient to clear the Plaintiff’s indebtedness. The hardship is to a charge who is restrained from exercising the statutory power of sale and the consequent risk that the debt may outstrip the value of the security.

DETERMINATION

Upon consideration of the instant application and the written and oral submissions made by parties

through Counsel the issues for determination are as follows;

- a) Has the Plaintiff established a prima facie case /balance of convenience?
- b) Is there imminent danger of irreparable damage pursuant to the defendant's exercise of statutory power of sale over the secured properties?

Has the Plaintiff established a prima facie case /balance of convenience?

The law governing granting of a temporary injunction was settled in the case of Giella Vs Cassman Brown And Company Ltd [1973] EA 358; MRAO vs 1ST AMERICAN BANK LTD & 2 OTHERS (2003) KLR 125

The plaintiff submitted that they have a genuine and arguable case based on the following issues to be determined;

- a) **The defendant acted in a high handed manner in failing to disburse the full loan accounts and deprived the Applicant from completing its projects as it caused immense havoc.**
- b) **The Defendant made various unauthorized changes in interest rates and applied to the accounts and the Defendant did not advise the client on the increase of interest.**
- c) **The defendant failed to supply upon demand copies of the charge documents and statements of account.**
- d) **The Defendant made the Plaintiff execute the documents at their offices and under duress. Perused the documents filed by the parties;**

The defendant through Counsel the plaintiff admitted they wrote to the Plaintiff letters dated 22nd August 2016, 5th July 2016 & 13th June 2016 annexed to Plaintiff's application and stipulated the principal amounts due and owing at the time and accrued interest at the time. This Court noted with concern that the Plaintiff failed to respond to these letters or write to the Defendant and raise any issues in contention including the issues now in raised in court. Therefore the Plaintiff has not contested the fact of obtaining facilitates for the Defendant, and default thereof save for alleged arbitrary increase of interest. From the evidence on record, the Plaintiff at no point approached the Defendant or wrote to the Defendant on challenging the random imposition of varied interest without advice or notice to the Plaintiff, contrary to the Banking Act, supply of copies of executed charge documents and/or statements of account.

Secondly, the Plaintiff in its submissions and more particularly at paragraphs 5 & 6 of the Plaintiff admits 4 of the charge documents executed as security for payments of the loan facilities. The Plaintiff admits that credit facilities were extended for;

- a) Finance the purchase of Commercial properties LR 209/136/65-Nairobi
- b) Finance purchase of 4 prime movers
- c) Finance purchase of residential home LR 3734/937
- d) Finance construction of offices convenience store fuel depot and petrol station
- e) Finance a fuel depot and petrol station

So against the allegation that the defendant failed to disburse the loan funds albeit late as alleged, there is confirmation by the Plaintiff that the Defendant facilitated the loan facilities through which the

developments highlighted above were developed. The Plaintiff received the loan funds and if not the Plaintiff has not particularized what was not disbursed by the Defendant as provided under the contracts.

Thirdly, the Plaintiff's allegation is that there was duress; they signed in the Defendants offices several documents. Apart from allegation of duress the particulars of duress were not outlined. This Court notes that the Plaintiff executed several documents with the Defendant for the facilities provided from 2011-2012;

In the case of *Benson Omwenga Anjere vs Kivati Nduto & Another [2013]eKLR*; Duress is defined as;

“Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would) [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand which he would not yield if acting as free agent.”

If the Plaintiff was under duress were all these charge documents executed on the same day, time and place? If not at the point the Plaintiff felt/found the Defendant put it under duress why did the Plaintiff continue to engage the Defendant to provide and Plaintiff accepted subsequent credit facilities? Why did the Plaintiff not halt/severe the transactions made under duress and move to another financial institution?

This Court finds the allegation of duress unfounded and unsubstantiated as the Plaintiff approached the Defendant and it was offered loan/credit facilities that it accepted, received and utilized to purchase, develop and maintain the developments outlined in paragraph 6 of Plaintiff. There is no evidence the Plaintiff returned the facility provided by the Defendant back to the Defendant as it was forced onto the Plaintiff based on unfair and unconsented terms. The Plaintiff failed to terminate the contracts executed under duress.

Fourthly, this Court perused documents/statements of account pg 207 -265 of the defendants bundle. It shows that the plaintiff from 2011-2015 diligently and regularly made repayments to the loan facilities provided by the Defendant in spite of arrears and interest charges. What happened after 2015 is not clear or disclosed to the Defendant or to the Court. Be that as it may; there was opportunity for the Plaintiff to approach the Defendant Bank at that time and disclose any dispute, grievance, circumstance or challenge with a view to rectification, readjustments or restructuring of facilities and/or repayments schedules. Instead there seems to have been a stalemate; there was no communication either orally or through correspondence between the parties.

In the absence of the plaintiff ventilating the grievances at the earliest opportunity and providing evidence that they tried but failed, the Court does not find a prima facie case to warrant granting an injunction.

The Plaintiff entered into contracts with the Defendant to provide loan and overdraft facilities to the Plaintiff and the Plaintiff to provide securities by executing charges, providing guarantees, and servicing the loan accounts. The Court cannot rewrite terms of these contracts only the parties may, meet and discuss and possibly vary the terms at their discretion.

The issue of interest is raised; the issue can only be resolved by the terms of the contract (s) by the parties. The Court can only intervene if the Plaintiff demonstrates by particularizing what interest was imposed unlawfully or irregularly and at what point contrary to the law. The law provides, that it would not by and of itself halt the chargee's lawful right in exercise of statutory power of sale as provided in **Section 44 & 52 of Banking Act.**

The Principal amount due and owing as at 22nd August 2016 is Ksh 431,080,643.99/- and interest Ksh 25,596, 864.39/- So even if interest is contested, the principal sum of the 5 facilities remains due and owing as the right of redemption of the charges by full payment has not taken place.

Section 90 (1) of the Land Act provides:

“If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.2

The Plaintiff admits receipt and use of the facilities provided by the Defendant; the Plaintiff executed documents of charges and guarantees through its directors. The Plaintiff serviced the loan and overdraft accounts from 2011 -2015. Thereafter, the Plaintiff defaulted on payment of the Principal sum and interest thereon. There is no restructure of the loan/overdraft and/or Repayment adjustments/ schedule available. The borrower failed or did not discharge its obligations under the agreement. Therefore, the Defendant was well within its right to exercise its statutory power of sale pursuant to **Section 90 (1) of the Land Act.**

B) Irreparable damage which would not adequately be compensated by an award of damages

Fifthly, the issue of irreparable damage that maybe occasioned to the Plaintiff would be compensable under **Section 99(4) of the Land Act.**

Andrew Muriuki Wanjohi –vs- Equity Building Society Ltd (2006) eKLR supra & Nancy Wacici v Kenya Women Micro Finance Bank Ltd [2017] eKLR the court held:

“The Plaintiff freely and voluntarily charged the subject property and was clearly aware that in the event of default in servicing the debt the property would be liable to be sold.”

Sixthly, the Plaintiff’s claim that statements of account and charge documents were not availed is not borne out by evidence on record. There is no written request (s) to the defendant to provide the said documents at any time before the onset of the suit. Thereafter, the Defendant through Counsel provided the statements as housed in the Defendant’s Replying affidavit and charge documents vide letter dated 18th April 2017.

The Court finds that the Plaintiff/Applicant admits obtaining facilities from Defendant/Respondent Bank and instead of exercising redemption they chose to sue the Bank. The Plaintiff has not established prima facie case to warrant an injunction or established any irregularity the Bank engaged in save to pursue realization of the securities based on valid contracts. There has been ample time from 2015 to date to regularize and comply with obligations under the Contracts.

DISPOSITION

- 1. The Application filed on 21st November 2016 for temporary injunction pending hearing of the suit is dismissed with costs.**
- 2. The main suit /application may proceed for hearing and determination after parties close pleadings and carry out case management and thereafter a date to be taken at the registry.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 22ND NOVEMBER 2019.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. DEYA HOLDING BRIEF MR. GACHIE FOR PLAINTIFF

MR. ODIEKI FOR THE DEFENDANT

MS JASMINE – COURT ASSISTANT