REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MILIMANI LAW COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO 613 OF 2015

JOHN JOEL KANYALI T/A KANYALI & CO. CONTRACTORS......PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD..DEFENDANT

JUDGMENT

1. The Plaintiff herein, who describes himself as an adult of sound mind and trading as Kanyali & Co. Contractors is the defendant's landlord on Land Title No. KWALE/DIANI BEACH BLOCK/605 where the Defendant's Ukunda Branch is located pursuant to a Lease Agreement that first commenced on 1st June 2010 and has since been renewed up to 31st May 2022. The Plaintiff is also holds a current account with the defendant at its Ukunda Branch and therefore has a Bank/Customer Relationship with the defendant besides the landlord/tenant relationship that I have already referred to hereinabove.

The Plaintiff's case

2. A summary of the plaintiff's case is that on 4th October 2011, owing to the dual relationship between him and the defendant, the defendant granted him an Overdraft Facility of Kshs.1,800,000/= against security of a Legal Charge Over Land Title Nos:KWALE/DIANI BEACH BLOCK/604 and 605 (hereinafter **"the suit properties"**) being working capital for the his construction business.

3. The plaintiff states that through a letter of offer dated 12th May 2012, the defendant subsequently agreed to advance to him a Mortgage Construction Loan of Kshs.12,000,000/= for a Fixed Term Loan of 10 Years (*120 Months*) at a Fixed Interest rate of 22% p.a and at a Fixed Repayment rate of Kshs.248,037/=. He adds that it was agreed that the initial overdraft of Kshs.1,800,000/= was to be liquidated from the Loan of Kshs.12,000,000/= and that thereafter only Kshs.10,200,000/= would be disbursed to him.

4. On 16th July 2012 the plaintiff executed a further charge together with a Deed of Rental Assignment on the understanding that the then prevailing Rent of Kshs.249,480/=, before the increase of 5% from 1st June 2012, would be more than sufficient to cover the Loan Repayment with a Surplus/Credit in favour of the Plaintiff. The said loan was secured against the following securities:

> ***a. A legal charge over title No s KWALE/DIANI BEACH BLOCK /604& 605***
>
> ***b. Further charge over title No. s KWALE//DIANI BEACH BLOCK 604 AND 605***
>
> ***c. Deed of rental assignment over title NO KWALE DIANI BEACH BLOCK 605***

5. The plaintiff claims that despite having assigned the rent to the defendant on 16th July 2012, the defendant took almost five (5) months to disburse the loan and continued to load interest on the Over-draft which increased from Kshs.1,800,000/= to Kshs.4,659,287.04 as at 30th November 2012 thereby leaving him with no option but to renegotiate a further facility of Kshs.13,000,000/= to enable him complete the construction whereupon he executed all the other necessary documents/securities on time but that the defendant took another five (5) months until March 2013 when it disbursed the loan.

6. He claims that contrary to the terms of their agreement, the defendant only disbursed Kshs.7,056,190/= after deducting Kshs.5,673,903.10 as interest accrued on the overdraft, Kshs.1,896,712.30 as interest on the second loan and Kshs.753,275.80 as further Interest on the first Loan. The above deductions prompted the plaintiff to write a protest letter dated 18th April 2013 claiming breach of the terms of the negotiated facilities and the Deed of Rental Assignment dated 16th July 2012. The plaintiff's case is that despite the perfection of all securities and the protest letter the loans were never disbursed until March 2013.

7. In its response to the plaintiff's said protest letter, the defendant proposed to refund Kshs.854,368.20 to the plaintiff. The plaintiff contends that the defendant did not act on the Deed of Rental Assignment and rent increment to Kshs.303,000/= as at 1st June 2012. He adds that no statement of rental income was provided by the defendant for a period of two (2) years prior to the issuance of the Statutory Notice dated 13th October 2015 demanding payment of the purported arrears of Kshs. 7,820,132.60 and alleging that the debt outstanding was Kshs.30,079,495.95. The above state of affairs prompted the plaintiff to file the present suit in which he seeks the following orders:-

a. A declaration that the plaintiff is not in any default in the loan repayment or any arrears to the defendant and the defendants Statutory notice dated 13/10/15 and received by the Plaintiff on 12/11/15 is irregular, Premature, Unlawful, illegal, Null and Void and of no effect in law.

b. A permanent injunction restraining the defendant by itself, its servants, agents or anybody acting on its behalf from selling, realizing or causing to advertise for sale the plaintiff's properties namely title no KWALE/DIANI BEACH BLOCK/604 AND 605 based on the statutory notice dated 13/10/2015

c. An order for provision of Account both for the Rental income payment by the Defendant to the Plaintiff in respect of the lease of office premises occupied by the defendants Ukunda Branch on title No KWALE/DIANI BEACH BLOCK/605 from 1st June 2010 until the date of judgment and how the sum has been applied to pay the loans advanced to the plaintiff by the defendant pursuant to the charge and 2nd further charge herein and the deed of rental assignment dated 16/07/2012 which took effect on 5th October 2012 and payment of any surplus therefrom to the plaintiff.

d. Damages for breach of trust and Agreement together with rectification of the 2nd further charge registered over the suit properties on 14/02/2013.

e. Costs of this suit together with interests thereon at court rates

f. Such further or other relief as the court deems just and expedient to grant in the circumstances of this case.

8. Contemporaneously with the plaint, the plaintiff also filed an application for injunction. The court then granted temporary orders of injunction pending the hearing and determination of the suit and also ordered the Defendant to provide a schedule of all rental payments made from 16th July 2012 when the Deed of Rental Assignment was executed, how the rental income was applied to the loan repayment and that a detailed affidavit explaining the same be presented in Court on 10th November 2015.

9. At the hearing of the case, the plaintiff adopted his witness statement and list of documents dated 7th December, 2019 as his evidence in chief. He reiterated that the defendant has been his tenant in the suit premises since 2010. He conceded that he obtained the loan facilities from the defendant in August 2011 for Kshs. 1.8 million, Kshs. 12 million in May 2012 and a further Kshs. 13 million in March 2013. He stated that as at 2010 the rent payable to him was Kshs. 249,000 when the loan repayment was Kshs. 248,000 and that he therefore assigned the rent due to him from the bank towards the repayment of the loan. He argued that he would not have fallen in arrears if the defendant was paying itself the rent, as and when agreed. He testified that contrary to the terms of their agreement, the defendant assigned the rent to the overdraft facility instead of the loan and did not pay itself in time or at all thereby leading to the accrual of interest as if he had arrears. He further testified that all his letters to the bank did not elicit any response.

Defendant's case

10. The defendant opposed the suit through its statement of defence filed on the 29th January 2016. It states that the cumulative loan facility advanced to the plaintiff was Kshs. 29,659287.04 with a repayment period of 119 months at the rate of 18.5% per annum thereby attracting a monthly repayment of Kshs. 459,857. The defendant denied any impropriety on its part and contended that it offered to refund to the plaintiff an amount of Kshs. 854,326.20 being the difference between the facility at the rate of 29% which offer the plaintiff rejected. The defendant's case is that the amount it recovered under the deed of rental assignment was not sufficient to cover the full monthly repayments.

11. DW1 CHRISTOPHER MARWA adopted his witness statement dated 9th February 2018 in examination in chief and relied in the defendant's bundle of documents as his exhibits.

Analysis and Determination

12. I have carefully considered the pleadings filed herein, the testimonies of the witnesses and the submissions made by the parties' counsel together with the authorities that they cited. The main issues for determination are as follows:

a. Whether the plaintiff is in default of the loan repayments or whether any arrears are due and owing to the bank.

b. Whether the banks statutory power of sale has arisen.

c. Whether the plaintiff has satisfied the conditions for grant of the equitable remedy of a permanent injunction.

d. Whether the plaintiff has established a case for accounts to be rendered.

a. Whether the plaintiff is in default of the loan repayments or whether any arrears are due and owing to the bank.

13. It was not disputed that the relationship between the plaintiff and the defendant is one of the chargee and chargor as well as the landlord and tenant. The first loan facility advanced to the plaintiff by the bank was an overdraft facility of Kshs.1,800,000 for a period of 1 year. The security offered to the overdraft facility was a legal charge over the property. The plaintiff applied for a further Mortgage /construction Finance loan facility of Kshs.12,000,000 which was approved by the bank by a letter dated 8th March 2012. This facility was secured by a further charge on the leased property and a deed of assignment of rental income. The plaintiff subsequently borrowed a further Kshs.13,000,000 being additional Construction finance loan from the bank.

14. From the evidence presented by the parties herein, it is not in dispute that the plaintiff charged the suit properties in order to secure credit facilities from the defendant at different intervals as enumerated hereinabove. The point of departure however, is in regard to the status of the plaintiff's loan account as while the plaintiff avers that he is not in arrears of the loan repayments on account of the deed on assignment of rent, the defendant on the other hand, states that the rent due to the plaintiff was not sufficient to cover the monthly loan repayments and that the plaintiff's loan account has an outstanding amount of Kshs. 23,314,542.49.

15. The plaintiff's case is that the bank was in breach of its obligations under the letter of offer as it took almost 5 months to disburse the loan after the plaintiff assigned the rent to the defendant thereby giving rise to the negative effect of having the overdraft increased from kshs.1,800,000 to Kshs.4,659,287.04.

16. The plaintiff also faults the bank for failing to provide an accurate account of the rental income. He further contends that upon execution of all the security documents, the bank took another 5 months, until March 2013, to disburse the loan and instead disbursed Kshs 7,056,190 after deducting Kshs.5,673,903.10 as interest accrued on the overdraft and another Kshs.1,896712.30.

17. The present case is governed by the law of contract. In ***Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla v Kidogo Basi Housing Corporative Society Limited and 31 Others*** **Civil Appeal No. 330 of 2003** the Court of Appeal **stated** that:

> ***"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."***

18. It is not disputed that the parties entered into a contract governed by specific terms. The rent payable under the lease dated 25th October 2010 was such that the rent would increase at the rate of 5% after every two years. The interest charged on the facilities was also subject to change according to the changes in the money market. The defendant admitted that there were instances where surplus would arise after offsetting the overdraft facility account. The court however notes that no notice of such surplus was given to the plaintiff but that at some point, and after a protest letter was sent to the defendant, the defendant offered to make a refund of Kshs. 854,368.20. to the plaintiff.

19. From the foregoing undisputed facts, I find that the plaintiff's claim that the defendant was opaque on the entries in his account is not far-fetched. It is clear to me that the defendant did not update the plaintiff on the manner in which it was charging interests in respect to the overdrawn account and the manner in which the surplus money was treated. I also note that the bank admitted default on their part in respect to charging interests and recommended a refund of Kshs.854,368.20.

20. On his part, the plaintiff did not also come clean on if the monthly rent he assigned to the defendant was sufficient to cover the monthly loan repayments that amounted Kshs.459, 857.00 after the second construction loan facility.

21. My finding is that based on the accusations and counter accusations by the parties and considering that neither the plaintiff nor the defendant presented full proof evidence on the plaintiff's account status, this court is unable to determine if the plaintiff was in default or not.

b. Whether the plaintiff has established a case for accounts to be rendered

22. Flowing from the determination of the first issue and having regard to the dual relationship of landlord/tenant and bank/customer between the parties herein, I find that it was incumbent upon the defendant to supply both the plaintiff and this court with a proper statement of accounts providing the details the total amount of rent it ought to have paid to the plaintiff during the entire period of their tenancy agreement as against the total loan repayments due. The defendant did not avail the said statements so as to enable this court to determine when, if at all, the plaintiff started to fall in arrears as the defendant had alleged.

23. It is noteworthy that one of the complaints raised by the plaintiff, which complaint was not denied, is that in many instances, the defendant did not pay itself or recover the rent that it ought to have paid to the plaintiff in time so as to offset the debt thereby leading to the unwarranted/artificial arrears. I note that it is for this reason that the first step taken by this court (differently constituted) at the initial hearing was to order the defendant to present a schedule of all rental payments made from 16th July 2012 when the Deed of Rental Assignment was executed, how the rental income was applied to the loan repayment. I note that even though the defendant filed a replying affidavit in court explaining the issue of the rental payments, the defendant's sole witness conceded that the statement of accounts supplied by the defendant was not satisfactory. The said witness (DW1) testified as follows on the plaintiff's indebtedness:

> ***"Accommodation to client were (sic) in writing but I do not have the write up in the documents that the defendant filed in court. From 2012 to date, I do not have a document to show how much rent the client has assigned/paid to us. I agree that it is important to know the amount the client has paid as rent in order to reconcile the account."***

24. It did not escape the attention of the court that one other complaint by the plaintiff was that the defendant accumulated the rental income

for long periods of time without offsetting the monthly/quarterly loan repayments thereby creating artificial loan arrears that had the effect of escalating the interests due to astronomical figures. This court is alive to the fact that in a loan agreement such as the one the parties herein executed, time of the repayments is of essence and any delay in crediting the plaintiff's account when the rent and loan repayments were due could have a negative impact in the interests and penalties that were eventually charged by the defendant.

25. I further observe that this court has not been told the total amount that the plaintiff has so far paid in respect to the loan facilities as against the total interest charged for the said facilities. The plaintiff prays for, inter alia, an order for provision of accounts which makes the plaintiff's case partly an accounting issue.

26. Looking at the statement of accounts presented by the defendant and considering the fact that the defendant at one point offered to make some refund to the plaintiff, I find that the statement of accounts provided by the defendant are not satisfactory and cannot assist this court in arriving at the determination on the plaintiff's indebtedness to the defendant, if any. I therefore find that the plaintiff has made out a case for the provision of accounts. In ***National Bank of Kenya Ltd v Pipeplastic Samkoti (K) Ltd & Another*** [2001] KLR 112 the court observed as follows:

> ***"The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff's claim. Taking and settlement of accounts is not done, normally by judges. Order 19 rule 1 of the Civil Procedure Rules provides that if a plaint prays for an account or where the relief sought or the plaint involves taking of an account an order for proper accounts with all necessary inquiries and directions in similar cases shall be made. It must be noted that, as pointed out earlier, there was no issue in the plaint, for taking of accounts. We reiterate that it is not for a Judge to take accounts. The reason is clear. It is not the job of a judge to be an accountant. That is why Order 20 rule 16 of the Civil Procedure Rules gives special directions as to taking accounts. Elaborate provisions have been made therein. The ad hoc method in which the learned judge proceeded to take and settle accounts was not only unprocedural but erroneous and without jurisdiction".***

Order 21 rule 17 of the *Civil Procedure Rules*, 2010 provides that:

> ***The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.***

c. Whether the banks statutory power of sale has duly risen

27. Section 96 of the Land Act provides that:

Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under Section 90(1), a chargee may exercise power to sell the charged land.

28. The above provision is explicit to the effect that if the borrower has fails to remedy a default in accordance with the notice issued under the law, the chargor is entitled to a notice with not less than 40 days under the section 96(2) of the Land Act.

29. In the present case, having found that the statements of accounts provided by the defendant are not satisfactory or sufficient in establishing the plaintiff's exact indebtedness, I find that the statutory power of sale does not arise.

30. I find that in light of the admission, by the defendant's witness, that there is need to reconcile the accounts, the plaintiff's claim that the statements of accounts filed by the defendant had serious discrepancies is valid.

d. Whether the plaintiff has satisfied the conditions for grant of the equitable remedy of a permanent injunction

31. As opposed to an order for temporary injunction which is only meant to be in force for a specified time, mostly to protect the subject matter of the case, until further orders from the court, a permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. In ***Nguruman Limited v Jan Bonde Nielsen & 2 Others,*** CA No. 77 Of 2012; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant seeking injunctive relief 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. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86).***

If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).

32. In ***Showind Industries v Guardian Bank Limited & another*** *[2002] 1 EA 284* Ringera, J. (as he then was) stated as follows:

"An injunction is granted very sparingly and only in exceptional circumstances such as where the applicant's case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant's conduct does not meet the approval of court of equity or his equity has been defeated by laches."

33. In the present case, I have already found that the issue of whether or not the plaintiff is indebted to the defendant has not been established by either of the parties. While I have already found that the plaintiff has made out a case for the provision of accounts, that does not necessarily mean that the plaintiff has been given a clean bill of health by this court in as far as his indebtedness is concerned. I find that it may as well turn out, upon taking proper accounts, that the plaintiff is truly indebted to the defendant. Having regard to such an eventuality, I find that it would be premature to grant orders of permanent injunction to restrain the defendant from selling the suit properties in order to realize its security. Needless to say, an order of injunction is an equitable remedy granted at the discretion of the court which discretion must always be exercised judiciously and only in the most deserving cases.

34. In the present case, I find that it will not be in the interest of justice to permanently restrain the defendant from exercising its statutory power of sale, where the same is warranted, should the plaintiff be found to be in default at the end of the accounting exercise.

Conclusion

35. Considering the findings that I have made in this judgment and the unique dual relationship of landlord/tenant and bank/customer that the parties herein have, I find that it will be appropriate to have an expert interrogate the dealings in the plaintiff's account in order to come up with an independent report on its true status before any further orders can be made regarding the remaining prayers sought in the plaint.

36. In order to expedite the conclusion of this matter the parties need to agree on a joint professional body or person to conduct an audit of the plaintiff's loan account, from its inception to-date, taking into account rental income received by the defendant under the Deed of Rental Assignment, in order to establish the exact account status and file an independent statement for this court's consideration.

37. In reworking the accounts, the accountant/auditor should pay special attention to the terms of the loan agreements especially the agreed interest rates and the Deed of Rental Assignment in order to ensure that the rents due to the plaintiff from the defendant are reflected in the plaintiff's account in a timely fashion, and in any event, in strict compliance with the tenancy agreement signed by the parties. On the issue of whether the rent due to the plaintiff was subject to tax deductions, I find that the said rent was exclusive of the tax, in which case, the defendant had no basis for claiming that it had received rent less taxes. The tenancy agreement was specific on the issue of taxes and that rent would be:

*"**Exclusive of any taxes including VAT and Charges which may at any time be imposed on the Property by the government or any other lawful authority and/or services to be provided including cleaning, parking or loading spaces which shall be contracted and agreed and/or charged separately**"*

38. If the parties agree on a joint statement, the costs thereof shall be shared in equal measures. The report shall be availed within 45 days from the date of this judgment.

39. Final orders shall then be made, upon the receipt of the report, on the prayers sought in the plaint and the costs of the suit. In the meantime, the interim orders of injunction issued on shall remain in force pending the final orders of this court.

It is so ordered.

Dated, signed and delivered in open court at Nairobi this 17th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kopere for the plaintiff

Mr. Mwango for the defendant

Court Assistant – Sylvia