



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HC. COMMERCIAL CASE NO. 86 OF 2016**

**TSS INVESTMENTS LIMITED.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**KAAB INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**OCEAN GROUP TRADERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application before me is dated 17th August, 2016. It is premised on the provisions of Order 40 rules 1, 2 and 4 of the Civil Procedure Rules, Sections 3A and 63 of the Civil Procedure Act and all the enabling provisions of the law. It seeks the following prayers:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this suit the 1<sup>st</sup> Defendant their servants and/or agents be restrained by way of injunction from alienating, transferring, charging, leasing, advertising for auction or in any other manner whatsoever dealing with the plaintiff's Mombasa/Block XXVI/658; alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the Defendants in respect of the plaintiff's account;

(iv) Spent; and

(v) That the costs of this application be provided for.

2. The application is supported by the affidavit of Mohamed Tahir Sheikh Said sworn on 17th August, 2016. The 1<sup>st</sup> defendant filed a replying affidavit on 1st November, 2016, sworn by Musa Dumbuya to oppose the application. The plaintiff's Counsel filed his submissions on 21<sup>st</sup> November, 2016. The 1<sup>st</sup> defendant's Counsel filed his on 15th February, 2017.

3. Mr. Balala, Learned Counsel submitted that the plaintiff is an alleged guarantor to whom a demand letter and statutory notice were issued to by the 1<sup>st</sup> defendant. He relied on the case of **Giella vs Cassman Brown** [1973] EA 358 in submitting that the plaintiff has a prima facie case with a probability of success and that damages will not suffice. He argued that guarantors enjoy certain rights and the 1<sup>st</sup> defendant owed the plaintiff a duty of care to ensure that it will not be sacrificed by ascertaining that the borrower adheres to the terms of borrowing.

4. Counsel stated that the law has always excused a guarantor for any negligence on the part of the lender, and that the guarantor herein has not engaged in any fraudulent activities. He cited the case of **Hariral and Company and Another vs Standard Bank Ltd.** [1967] EA where the Court held at paragraph F that if there is any alteration in the form of guarantee, the surety should be consulted but it is not open to the bank without the consent, to alter the terms of its dealing with its merchants and expect the guarantor to be bound by a guarantee relating to a different course of dealing at any time of the term of the facility.

5. It was submitted for the plaintiff that the 1<sup>st</sup> letter of offer was the original one and that the plaintiff was not part of the letter of offer of 22<sup>nd</sup> November, 2013. The court was informed that the amount lent was Kshs. 735 Million and US Dollars 300,000 but the guarantor was not privy to that contract.

6. Mr. Balala contended that on 11<sup>th</sup> February, 2014, there was a supplemental offer amending the 1<sup>st</sup> letter of offer in which securities provided by an all assets debenture was required to be entered for Kshs. 735 Million and 385,614,000/= to be shared *pari passu* with Standard Chartered Bank. There would be a legal charge in favour of National Bank over the suit property described as Mombasa/ Block XXVI/658 in the name of the plaintiff. The charges in existence before were removed and new ones introduced. Counsel stated that to date, no debenture in *pari passu* with Standard Chartered Bank has been granted. It was argued that the 1<sup>st</sup> defendant negligently ignored charges previously created by Kenya Commercial Bank and National Industrial Credit (NIC) Bank, whereby the guarantor eventually found that the primary security was heavily invested by other borrowers that it was worthless. He indicated that the value of the security the 1<sup>st</sup> defendant is holding is Kshs. 1.7 Billion.

7. In reference to the charge, it was stated that it is dated 3rd March, 2014 and on pages 23 and 24 thereof, the affidavit therein was sworn on 17th February, 2014. It was submitted that it was unconceivable that the charge was executed on the same date the letter of offer was issued.

8. Counsel indicated that the principal amount under the charge was Kshs. 585,000,000/= and that the entire exercise was fraudulent in nature. The court was informed that the 1<sup>st</sup> defendant prepared a further charge on 14<sup>th</sup> of April, 2014 for the sum of Kshs. 149,400,000/=. He added that the US Dollar amount was not secured by the plaintiff.

9. Mr. Balala, further submitted that when the demand and statutory notice were sent to the plaintiff, the 1<sup>st</sup> defendant demanded for all amounts it had lent. Reference was made to the demand letter of 28th December, 2015 and the court was informed that there was no charge made on 22<sup>nd</sup> November, 2013 and that the said letter was addressed to Tahir Sheik Said Investments Ltd.

10. Counsel for the plaintiff stated that the notice of intention to sell was issued on 8th April, 2016 and that any demand under Section 96 of the Lands Act which is higher than the security advanced is a fetter on the clog of redemption. He relied on the decisions in **Kisimani Holdings Limited & Another vs Fidelity Bank Limited** [2013] eKLR, **Francis Joseph Kamau Ichatha vs Housing Finance Company of Kenya Ltd** [2014] eKLR and **David Ngugi Ngaari vs Kenya Commercial Bank Ltd** [2015] eKLR, to support his submissions. Mr. Balala argued that the guarantee offered by the plaintiff was only limited to the initial loan exclusive of interest thus the plaintiff was a stranger to the sum claimed of Kshs. 986,928,079.55 and that the US Dollars 333,395.45 was not part of the security.

11. On the issue of registration of charges and the debenture, it was submitted that the 1<sup>st</sup> defendant failed in registration of the charges. It was submitted that Section 96 of the repealed Companies Act provided that a charge needed to be registered within 42 days but in this case the charges were registered one year after they were signed, rendering them null and void. He relied on the decisions in **Ibis Aviation Limited vs Equatorial Commercial Bank Limited (James Tulideph Birnie)** [1999] eKLR. He stated that although Section 102 of the repealed Companies Act provides for extension of time in registration of charges, there was no extension by the court.

12. With regard to the debenture, it was stated that it was for TSS Grain Millers Limited and it resulted in nothing as the order by Muya J., of 29th October, 2014 amounted to nothing as it gave no extension of time for registration of the same. The debenture was thus registered out of time. It was stated that the debenture was void against other parties and the guarantor was compromised as a result of the same.

13. In closing his arguments, Mr. Balala submitted that the loan did not confer any commercial benefit to the guarantor. He relied on **Charterbridge Corporation Ltd. and Another vs Lloyds Bank Ltd & Another** [1969] 3 WLR, **Hoffman vs La Roche and Company Industry vs Secretary of State for Trade and Industry** [1975] AC and on the treatise on Economic and Financial benefit of corporate guarantees - An International comparison, Butterworth Journal of International Banking and Financial law- June, 2002. Counsel stated that it is imperative for it to be shown that commercial entities that guarantee others derive a commercial benefit.

14. Mr. Mutua, Learned Counsel for the 1<sup>st</sup> defendant opposed the application by stating that the dispute herein relates to whether his client is entitled to exercise its statutory powers of sale on the charge guaranteed by the plaintiff. He submitted that the charge and further charge were registered in the lands' office to secure the amounts in issue. He stated that the amounts secured have not been repaid and loans are outstanding. He argued that the plaintiff had not disputed the execution of the charge and the further charge.

15. Counsel submitted that it is the policy of the law to hold parties to the bargains they enter into in commercial transactions and that the 1<sup>st</sup> defendant's attempt to realize its security does not flow from a contract of guarantee. He referred to clause 1 of the charge where the chargor covenants to pay the amount secured under the charge. Counsel took the position that the obligation to pay is personal to the plaintiff thus the relationship is of a lender and principal borrower as contained in clause 34 of the charge. It was submitted that the issue herein is not a contract of guarantee and the issue of the plaintiff being a guarantor does not arise.

16. As for the debenture, Mr. Mutua submitted that it was not meant to be the primary security and it was not in the documents on record. He stated that the charge created by the plaintiff rendered it the principal borrower and if there was an intention to make the charge herein subservient to the debenture, then it would be a collateral to the charge. He stated that the security herein is a stand-alone and not related to the debenture. He relied on the case of **Nairobi Mamba Village vs National Bank of Kenya** [2002] 1 EA 197, to fortify his submissions.

17. Counsel for the 1<sup>st</sup> defendant contended that the only party who would benefit would be a liquidator of the company challenging the position of another creditor. He stated that failure to comply with Section 96 of the Companies Act, Cap 486 (now repealed) does not benefit the plaintiff who should have ensured that the securities were registered.

18. It was indicated that copies of certificates issued by the Registrar of Companies for the charge and further charge were attached to the 1<sup>st</sup> defendant's replying affidavit at pages 21 and 22.

19. In making reference to **Ibis Aviation Limited vs Equatorial Commercial Bank Ltd** (supra) at page 124 of the plaintiff's authorities, Counsel stated that the remarks therein are *obiter dictum*. He urged the court to adopt the provisions of Sections 96, 97 and 99 of Cap 486, Laws of Kenya and the reasoning of the court in the case of **Jacob Juma vs AFC and Others** [2005] eKLR.

20. On statutory notices grounded on the provisions of Sections 90 and 96 of the Land Act, it was submitted that the notices were rightfully issued to the chargor and that the plaintiff undertook to secure the principal sum and interest based on the charge and further charge.

21. Mr. Mutua referred to clause 23 of the charge and argued that it constituted a continuing security and the charge therefore secures the amount outstanding and interest as well as the foreign currency account. It was submitted that if the court finds that it was erroneous to combine the Kenya Shillings and foreign currency account, it could order the 1<sup>st</sup> defendant to issue a fresh statutory notice. He cited the case of **National Bank of Kenya Limited vs Shimmers Plaza Limited** [2009] eKLR where the Court of Appeal granted a temporary injunction pending the issuance of valid statutory notices in accordance with the law. He prayed for the application to be dismissed.

22. In response to the submissions by the 1<sup>st</sup> defendant's Counsel, Mr. Balala argued that a charge has to be viewed in the context of the underlying transaction which was based on the 1<sup>st</sup> and 2<sup>nd</sup> letter of offer. He stated that the 3<sup>rd</sup> letter of offer varied the letter that brought in the 1<sup>st</sup> defendant in September, 2014 which gave different amounts and the plaintiff was discharged from any obligation.

23. Counsel referred to page 68 of the 1<sup>st</sup> defendant's authorities, where it is stated that the court needs to look into the substance of the documentation. He counteracted Mr. Mutua's submissions on the **Ibis Aviation Limited vs Equatorial Commercial Bank Ltd** case (supra) by stating that the Court of Appeal in examining Section 99 of the English Act noted that Kenyan law regards charges registered in time valid. He stated that the case of **Jacob Juma vs AFC and Others** [2005] eKLR (supra) was decided in the year 2005 and is therefore inapplicable to the present land laws. Counsel for the plaintiff agreed that where a demand is wrongly framed the court can order a fresh demand notice to be issued where there are no other valid irregularities. He prayed for the court to grant orders of an injunction.

### **Analysis and determination**

The issue for determination is if the principles for the grant of an interim injunction have been satisfied.

24. I have perused the affidavits in support of each party's case and the annexures thereto, and my findings are that:-

(i) On 22<sup>nd</sup> November, 2013, the 1<sup>st</sup> defendant in reference to an application made by TSS Grain Millers Limited issued a letter of offer to the said company for the sum of Kshs. 735,000,000/= and USD 300,000. A breakdown of the amount that was advanced in Kenya Shillings is well outlined in the letter of offer which is annexed to the plaintiff's affidavit as TSS6. Various securities were offered to secure the facilities. These were:-

(a) An all assets Debenture over the company's fixed and floating assets of Kshs. 735,000,000.00 valued Kshs. 1,763,280,000.00 (omv) and Kshs. 385,614,000.00 (fsv) as at 30.06.2013;

(b) A legal charge in favour of the Bank to secure Kshs. 89,600,000.00 over L.R. No. Portion Number 61 in the names of TSS Transporters Limited valued at Kshs.112,000,000.00 (omv) and Kshs. 89,600,000.00 (fsv) (the property to be valued);

(c) A legal charge in favour of the bank to secure Kshs. 200,000,000.00 over L.R. No. 11215 in the name of Tahir Sheikh Said Ahmed valued at Kshs. 250,000,000.00 (omv) and Kshs. 200,000,000.00 (fsv) (the property to be valued);

(d) A legal charge in favour of the Bank to secure Kshs. 296,000,000.00 over L.R. No. 10801 in the name of Tahir Sheikh Said Ahmed valued at Kshs. 370,000,000.00 (omv) and Kshs. 296,000,000.00 (fsv) (the property to be valued);

(e) Joint and several personal guarantees for Kshs. 735.0 Million and USD 300,000.00 for all the directors of the borrower namely;

(i) Tahir Sheikh Said Ahmed; and

(ii) Fatuma Tahir Sheikh Said

(f) Property owners' guarantee to be executed by Tahir Sheikh Said Ahmed for Kshs. 496.0 Million;

(g) Corporate guarantee by TSS Transporters Limited for the sum of Kshs. 89.6 Million supported by joint and several personal guarantees by the directors of TSS Transporters Limited; and

(h) An all assets Debenture for Kshs. 735,000,000.00 to be shared *Parris Passu* with Standard Chartered Bank.

25. On 11<sup>th</sup> February, 2014, variation was made to clause 10 of the letter of offer with regard to new securities being introduced. These included:-

(a) An all assets debenture over the company's fixed and floating assets of Kshs. 735,000,000.00 valued at Kshs. 1,763,280,000.00 (omv) and Kshs. 385,614,000.00 (fsv) as at 30.06.2013 to be shared *Parri Passu* with Standard Chartered Bank;

(b) A legal charge in favour of National Bank to secure Kshs. 735,000,000.00 over L.R. No. Mombasa/Block XXVI/658 in the names of Tahir Sheikh Said Investments Limited with an indicative value of Kshs. 900,000,000.00 (omv) (the property to be valued);

(c) Joint and several personal guarantees for Kshs. 735.0 Million and USD 300,000.00 for all the directors of the Borrower namely;

(i) Tahir Sheikh Said Ahmed; and

(j) Fatuma Tahir Sheikh Said

(d) Corporate guarantee by Tahir Sheikh Said Investment Limited for the sum of Kshs. 735,000,000.00 supported by joint and several guarantees by the directors of Tahir Sheikh Said Investment Limited.

(e) An all Assets Debenture for Kshs. 735,000,000.00 to be shared *Parri Passu* with Standard Chartered Bank.

26. A charge was registered on 3<sup>rd</sup> March, 2014 with the chargor being the plaintiff herein and the borrower being Tahir Sheikh Said Grain Millers Limited (TSS Grain Millers Ltd.), a copy thereof is attached to the plaintiff's affidavit and marked as TSS7. The charge secured a facility in the sum of Kshs. 585,600,000/=. The exhibit attached to the plaintiff's affidavit and marked as TSS8 contains a further charge registered on 14<sup>th</sup> of April, 2014 which shows that the plaintiff offered security for a facility in the sum of Kshs. 149,400,000/=. The borrower in both the charges is given as TSS Grain Millers Ltd. In view of the contents of the said charge, I decline to be persuaded by Mr. Mutua's argument that the plaintiff herein was the borrower of the two facilities. This court's finding is that the plaintiff offered security for the said loans. Directors of the plaintiff herein gave their consent to the creation of the two charges. This court also notes that two Directors of the plaintiff acceded to the variation of the facilities.

27. A certificate in respect to the charge in the sum of Kshs. 585,600,000/= was issued by the Companies Registry on 12<sup>th</sup> February, 2015. A second certificate was issued by the said Registry on 12<sup>th</sup> February, 2015 for the charge in the sum of Kshs. 149,400,000/=. The said documents are attached to the 1<sup>st</sup> defendant's affidavit and marked as MD3a and MD3b, respectively.

28. The plaintiff also executed a corporate guarantee in respect to the principal sum of Kshs. 735,000,000/=. It also executed a corporate guarantee of US Dollars 300,000 as per clause 10 of the charge. The said documents are annexed to the 1<sup>st</sup> defendant's affidavit and marked as MD1. Through subsequent charges, the said sum was secured through joint and personal guarantees of Kshs. 735,000,000/= and US Dollars 300,000.00 for all the Directors of the borrower, namely Tahir Sheikh Said Ahmed and Fatuma Tahir Sheikh Said.

29. Mr. Mutua for the 1st defendant relied on the provisions of clause 23 of the charge which states that *"the charge shall be a continuing security and shall not be satisfied, discharged or by any intermediate payment or settlement of account (or where the chargor is an individual) the death bankruptcy or incapacity of the chargor or the winding up, insolvency or in incapacity of the chargor or the winding up, insolvency or liquidation of the borrower."* As Mr. Mutua correctly put it, clause 23 remained valid even after the variation of the securities.

30. The demand notice dated 28<sup>th</sup> December, 2015 issued under the provisions of Section 90(1) and 90(2) of the Land Act, 2012 was addressed to the plaintiff requiring it to pay the outstanding sum of Kshs. 936,803,816.75 and US dollars 343,363.30. The notice gave the plaintiff 3 months to make good the payment.

31. The 1st defendant on 8th April, 2016 issued the plaintiff with a notification of sale of the property it offered as security, pursuant to the provisions of Sections 96(2) of the Land Act, 2012. The said notice was valid for 40 days.

32. The plaintiff contests the said claim for being way above the amount it offered as a guarantee and secondly that it was not the principal borrower but a guarantor to whom the 1st defendant owes a duty of care to ensure that the plaintiff's interest at all times is not sacrificed out of the 1st defendant's own misfeasance or negligence.

33. The principles for grant of an injunction were laid out in the case of **Giella vs Cassman Brown** (supra) where Spry VP held that as follows:-

***"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

34. Having perused the letter of offer, documentation with regard to variation of securities and the legal charges on record, it is apparent that the plaintiff offered its property as security and gave a corporate guarantee to make good the loan payment in the event of default by TSS Grain Millers Ltd. but upto the amount of money it guaranteed. The plaintiff cannot be said to be the principal borrower. The notices issued were however addressed to the plaintiff herein as if it was the borrower and not the guarantor. The sums claimed were in excess of the guarantee given by the plaintiff. There is nothing to indicate that the 1st defendant brought to the attention of the plaintiff the default in payment of the loan on the part of TSS Grain Millers Ltd.

35. Mr. Mutua relied on the case of **National Bank of Kenya Limited vs. Shimmers Plaza Ltd** [2009] eKLR where it was held that where a court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then the order of injunction should be limited in duration until such time that the mortgagee shall give a fresh statutory notice in compliance with the law.

36. The bank statements attached to the 1<sup>st</sup> defendant's replying affidavit show that money was advanced to the TSS Grain Millers Ltd., but a big debit is reflected in the said statements to show that payments have not been made as expected. Taking into consideration all the facts surrounding this case, it is this court's finding that the plaintiff is entitled to an interim injunction only for a limited duration of time.

37. I therefore make an order restraining the 1<sup>st</sup> defendant, its servants and/or agents from alienating, transferring, charging, leasing advertising for auction or in any other manner whosoever dealing with the Plaintiff's Mombasa/Block XXVI/658 until such time as the 1<sup>st</sup> defendant shall have served the plaintiff with requisite correspondence and relevant documentation informing it of the default by the principal borrower, TSS Grain Millers Ltd., as well as copies of a demand notice under Sections 90(1), 90(2) and a Notification of sale under the provisions of Section 96(2) of the Land Act.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of April, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the plaintiff

Mr. E. Nyongesa holding brief for Mr. Mutua for the 1<sup>st</sup> defendant

Ms Mutune holding brief for Ms Moka for the for the 2<sup>nd</sup> and 3rd defendants

Mr. Oliver Musundi - Court Assistant