REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 235 OF 2018

TRAPOS LIMITED.....1ST PLAINTIFF

EUSTACE KABURU MWARANIA.....2ND PLAINTIFF

KELLEN MUMU KABURU.....3RD PLAINTIFF

VERSUS

I & M BANK.....1ST DEFENDANT

J.M GIKONYO T/A

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

RULING

1. I have to make a quick decision as to whether or not to allow the Auction in respect to LR NO.1160/698 (charged property) to proceed this morning at 11.00am

2. Briefly, I & M Bank Limited (The Bank) issued the Trapos Limited (the Applicant or Trapos) a Standby Letter of Credit (SBLC) to the tune of Khs.25,000,000/= in favour of CFC Stanbic Bank (CFC) Ltd, who together with Trapos, were signatories to an agreement known as an Advisory & Arranging Mandate Agreement (Agreement) dated 8th January 2014. As security for the facility, the Bank took a charge over the charged property.

3. A complaint by Trapos is that in September 2017 while it was meeting its obligations under the Terms of the Agreement, CFC inexplicably, unreasonably, unconscionably, maliciously and/or fraudulently called for the draw down of the SBLC. Indeed in respect to the dispute with CFC, Trapos filed HCCC No.430 of 2017 (Trapos Ltd vs. CFC Stanbic Ltd). The grievance by Trapos against the Bank is that in manifest negligence in its professional undertaking, it honoured a call for payment by CFC which was not based on actual default on its part. It is asserted that SBLC is a secondary mode of payment and only obligated CFC to honour a call for payment from CFC after ascertaining default on the part of Trapos of any of the preconditions set in the underlying Agreement and not on mere assertion of default.

4. In essence, the Claim by Trapos is that the Bank wrongfully and unlawfully paid CFC and cannot therefore sell the Charged Property. Together with presentation of the Plaint, the Plaintiffs filed a Notice of Motion dated 8th June, 2018 whose plea include a prayer to injunct the Auction due this morning.

5. I have considered the matter in the context of the pleadings and affidavit evidence before me, the arguments made by Counsel and the law as I understand it.

6. It is common ground that prior to the 2nd Defendant issuing the Notification of sale, the Bank had issued the two Statutory Notices required by the Land Act. The Notification of Sale itself being made as required by the Auctioneers Rules. The process leading to the intended Auction is therefore not faulted.

7. What is impugned is the manner in which the Bank reacted to the call up by CFC and the subsequent payment.

8. The Bank Guarantee which is at the heart of this dispute avows, on its own face, to be subject to the Uniform Rules for Demand Guarantees of the International Chamber of Commerce (publication No.758) (URDG 758). These are Rules designed to unify Independent Guarantee practice world over. These Rules form a common base for a discussion as to whether the Plaintiffs have demonstrated, on a prima facie basis with probability of success,that the Bank was at fault in making the payment following the call up.

9. Trapos sees infraction of three Articles namely Articles 15, 16 and 22 of URDG 758. Let me examine each in turn.

10. Article 15(A) is relevant to this matter and reads,

> "A demand under the guarantee shall be supported by such other documents as the guarantee specifies, and in any event by a statement, by the beneficiary, indicating in what respect the applicant is in breach of its obligations under the underlying relationship. This statement may be in the demand or in a separate signed document accompanying or identifying the demand."

11. The call up was made on 9th October 2017, and reads as follows,

> "*We refer to your Guarantee above mentioned for USD 250,000 (and hereby certify that Trapos Limited has not fulfilled its obligations towards ourselves.*
>
> *Demand is hereby made that USD. 250,000 (UNITED STATES DOLLARS TWO HUNDRED AND FIFTY THOUSAND) be transferred via wire transfer to Stanbic Bank Kenya Limited's Account No.01000005106 with Central Bank of Kenya Limited.*
>
> *We are hereby drawing USD.250,000 (UNITED STATES DOLLARS TWO HUNDRED AND FIFTY THOUSAND) against the Guarantee No. SBLC/14/2014 with respect to the amount that is due, payable and owed to us by Trapos Limited.*
>
> *Please therefore kindly but urgently arrange to honour this drawing.*"

Trapos take a view that this demand falls short of the requirements of Article 15 because it lacks a statement.

12. The Rules themselves define a supporting statement as "the statement referred to in either Article 15(A) or Article 15(B) and does not provide much assistance in understanding the nature of Statement contemplated by Article 15(A). Yet Article 15(A) itself seems fairly clear as to what should comprise the statement. In the words of Article 15(A), it is a statement, "indicating in what respect the applicant is in breach of its obligations under the underlying relationship", it is not a Bank statement. To understand it that way is to misunderstand it. In the call up, CFC states that Trapos has not fulfilled its obligations towards them. Article 15(A) does not set out how detailed the statement ought to be and I am not therefore certain that the statement contained in the call up is insufficient. A more firm finding will be made by the Trial Court.

13. Let me deal with Article 22 before coming back to Article 16. Article 22 reads:-

> "The guarantor shall without delay transmit a copy of the complying demand and of any related documents to the instructing party or, where applicable, to the counter-guarantor for transmission to the instructing party. However, neither the counter-guarantor nor the instructing party, as the case may be, may withhold payment or reimbursement pending such transmission"

Mr. Mueke for the Bank told Court that he did not have information as to whether the relevant documents were transmitted and the Court therefore proceeds on the assumption that they were not. The Bank however maintains that because of the rider to Article 22, that the instructing party (like Trapos) may not withhold payment pending such transmission, nothing may turn on the non-transmission.

14. The rider to Article 22 speaks to a fundamental character of a Demand Guarantee. Article 5 of URDG 758 itself emphasis the nature of independence of Guarantee in the following words,

> A. "A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.
>
> B. A Counter-guarantee is by its nature independent of the guarantee, the underlying relationship, the application and any other counter-guarantee to which it relates, and the counter-guarantor is in no way concerned with or bound by such relationship. A reference in the counter-guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the counter-guarantee. The undertaking of a counter-guarantor to pay under the counter-guarantee is not subject to claims or defences arising from any relationship other than relationship between the counter-guarantor and the guarantor or other counter-guarantor to whom the counter-guarantee is issued".

As a general proposition, a demand guarantee is independent of the primary Contract and will not be affected by dispute between the parties to the underlying of transaction. Of course as argued by Mr. Mueke, encashment of a Bank Guarantee can be withheld in limited instances where;

> (i) There is egregious fraud which the bank is aware of

and

(ii) allowing encashment would occasion irrevocable harm to one of the parties concerned.

In view of this nature of a Demand guarantee, non-compliance with Article 22 would not have stopped the Bank from making payment

15. It is also from the above perspective that one must perceive the provisions of Article 16:-

> "The guarantor shall without delay inform the instructing party or, where applicable, the counter-guarantor of any demand under the guarantee and of any request, as an alternative, to extend the expiry of the Guarantee. The counter-guarantor shall without delay inform the instructing party of any demand under the counter-guarantee and of any request, as an alternative, to extend the expiry of the counter-guarantee".

There was no proof that the Bank complied with the provisions of this Article. Is that failure fatal in the circumstances of this case?

16. As a starting point, I need to observe that the Guarantor is obligated by the Rule to, without delay, inform the instructing party of any demand. The words 'without delay' may seem imprecise but must be construed in the circumstances of each case. If like here, the Guarantee was payable within 3 working days of receipt of the Demand, then the Bank would have been obligated to inform Trapos before making the payment. Perhaps at least one day before making the payment. If however a Guarantee is payable immediately on Demand, then because of the exigencies of meeting the Demand, notification may only be possible at the time of or so soon after making payment.

17. It was suggested by Mr. Mueke that because the instructing party could never stop payment of the Demand, the Notification required by Article 16 counts for nothing. In trying to understand the rationale or object of the Rule, I have come across an Article by Christopher Martin Radtke, "The URDG Revision; A CRP members view" in which the author states,

> "That the guarantor shall, without delay, inform the instructing party of a demand. Without in any way compromising the independent nature of the guarantee, immediate information about the demand before payment provides the instructing party with the opportunity to contact the beneficiary and to sort out any commercial problems which might have provoked the demand in the first place. Far from prejudicing the efficacy of independent guarantees, the duty to immediately inform the beneficiary about a demand before payment enhances the utility of the guarantee as a financial instrument that will improve commercial relations among users. At present, this is worldwide practice".

I am persuaded that Notification under Article 16 is an important step as it gives an opportunity to the instructing party and the beneficiary to resolve commercial problems (which need not be controversial) that led to the call up. There should be no apprehension that it gives the instructing party time to seek and obtain an injunction as there is widespread and broad respect for the Independence of a Demand Guarantee and obtaining an Injunction is onerous and will not be plainsailing.

18. It is accepted that no notification was made by the Bank. Is this enough to fault payment to CFC? From the evidence this Court can gather, this payment was made on 12th October 2017. There is also evidence (*see copy of the Court order in Civil Suit 430 of 2017 annexed EM8 to the Affidavit of the 2nd Defendant*), that CFC sought to terminate the agreement through a Notice dated 3rd October 2107 and it would seem to me that Trapos could reasonably anticipate that a call up of the Guarantee would be made by CFC. A possible outcome of the termination! The Court Order shows an intention by Trapos to refer its disagreements with CFC to Arbitration and an attempt to obtain Interim Protection under the provisions of Section 7 of The Arbitration Act. In the end, the Orders of Protection came a little too late after payment had already been made. These events demonstrate that the call up may not have come as a surprise to Trapos and, prior thereto, Tapos may have had opportunity to sort out its commercial problems with CFC. Such an opportunity being the essence of the notification require by article 16, it may well be argued that, at least in the circumstances of this case, noncompliance of those provisions by the Bank may not be fatal.

19. In my assessment, while there is a valid argument by Trapos in respect to Article 16, the response by the Bank may not be a trifle. As always, a final call will be made by a Trial Court. For this reason I am not altogether certain that the Plaintiffs have made out a prima facie case with a probability of success.

20. On the second test of **Giella,** it seems fairly clear to me that the damages that the Plaintiff may suffer is not irreparable. Yes, the charged property may well be a matrimonial home but the Chargors offered it as security in the full knowledge that it was their home and thereby converted it to a commodity that could be sold in the event of default. The Chargors would be well aware of the consequences of their action. This Court is not told that the Bank will not be able to pay any damages that may be eventually awarded to the Plaintiffs in the event of success.

21. I reach this decision conscious that there is no inflexible Rule that an Injunction will not issue where the party may not suffer irreparable damages. A restraining Order will issue even where monetary compensation is adequate if the conduct of the offending party is flagrant, arrogant and blatant breach of the law. But in the matter before me I have not been able to find that the Bank has acted blatantly, arrogantly or in overt breach of law.

22. In closing I need to remind parties that the Plaintiffs approached this Court for an equitable remedy. Equity has certain expectations! For example, Equity expects a suitor to be vigilant. The auction due shortly is a culmination of events which began with issue of a Statutory Notice on 9th October, 2017, a Notice that admittedly was received by the Plaintiffs. This matter was only filed on 8th June 2018. No reason was proffered as to why the Plaintiffs had to wait 7 months or so before mounting this action. On delay alone I would have declined the orders.

23. For reasons given, I refuse to stop the Auction due later today.

Dated, delivered and signed in open Court at Nairobi this 19th day of June 2018.

F. TUIYOTT

JUDGE

In the presence of;

Atonga for Plaintiffs

Mueke for Respondents

Nixon-Court Assistant