



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL CASE NO. 21 OF 2018**

**ERDEMANN PROPERTY LTD.....PLAINTIFF/APPLICANT**

**VERSUS**

**CREDIT BANK LIMITED .....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicant herein filed a Notice of Motion dated 25/09/2018 seeking the following reliefs:-

a. That pending the hearing and determination of this suit this Honourable court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing or otherwise howsoever completing by conveyance or transfer or any sale concluded by auction or private treaty, taking possession, appointing Receivers or exercising any power conferred by Section 90(3) of the Land Act, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership of and title to all that parcel of land known as L.R No.12867/13.

b. That pending the hearing and determination of this suit a prohibitory injunction do issue restraining the Defendant from issuing or advancing any adverse notice or information to any licensed Credit Reference Bureau in regard to the purported loan(s) or overdraft herein.

c. That an order be made under the doctrine of lis pendens and Section 106 of the Land Registration Act (previously enshrined under Section 52 of the Indian Transfer property Act (1959) (Repealed) that pending final determination of this suit in accordance with the law ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, suit leasing, allotment, user, occupation or possession or in any kind of right title or, interest in the charged properties with any land registry, Government department and all other registering authorities be and is hereby prohibited in ALL THAT parcel of land known as LR. No. 12867.

d. THAT an interlocutory mandatory injunction do issue compelling the Defendant to render a true, proper and accurate account to the Plaintiff(s) and the court on actual status of the charge account(s).

e. That the costs of and occasioned by this application be provided for.

2. The Application is grounded upon the grounds on the face of the application as well as the affidavit of ZEYUN YANG a director of the Plaintiff *sworn on even date. The Applicant's gravamen is as follows:-*

i. That it is the registered proprietor of all that parcel of land known as LR No.12867/13.

ii. That on or about March 2017, the Plaintiff approached the defendant for an enhanced banking facility to finance its working capital requirements which request was granted and a letter of offer whose salient terms were as follows:-

a. Type of facility – enhanced overdraft from Kshs.500m to kshs. 600 m.

b. Interest – 14%.

c. Security – joint guarantee of the directors for an *aggregate sum of Kshs.600m.*

- *Legal charge and further legal charge over LR No. 209/20567 for the above aggregate sum.*

iii. That sometimes in September, 2017 the Plaintiff requested the Defendant for substitution of security which request was allowed and a new security namely LR No. 12867/13 and a legal charge over the same amount was registered.

iv. That the charge aforesaid provided for three months demand notice to issue for secured obligation but that none has been issued to the Plaintiff.

v. That the Plaintiff had been liquidating the facility within the stipulated time and had no issue with the Defendant until May, 2018.

vi. That on 10/5/2018 the Plaintiff received the sum of Kshs.293,393,146/= in its account with the Defendant from Nairobi city County in honour and satisfaction of a decree issued vide Nairobi HCC No. 32 of 2017.

vii. That the Defendant upon receipt of the said sums withheld the same for about 2 months as a result of which the Plaintiff suffered immense prejudice and loss in excess of Kshs.1,679,646,269/= in accumulated interest and charges, loss of projects, substantial loss of goodwill for delayed handover of houses and accumulated legal and professional fees.

viii. That the Plaintiff was compelled to approach the court in NBI HCC No.32 of 2017 to compel the Defendant to release the said monies.

ix. That due to the Defendants actions, the plaintiff was compelled to file a civil suit namely NBI HCC No. 163 of 2018 seeking special damages of Kshs.1,679,269/= as well as breach of contract and interest against the Defendant.

x. That the Plaintiff's suit aforesaid provoked the Defendant who retaliated by threatening to recall the entire facility.

xi. That the Defendant has vide a demand notice dated 12/09/2018 threatened to realize the security and issue an adverse notice or information and have the Plaintiff's name listed with the Credit Reference Bureau (CRB) unless the sum of Kshs.624,800,468/68 is paid within 14 days.

xii. The Plaintiff feels that the actions of the Defendant are actuated by malice as it is intended to severely cripple the Plaintiff and cause it untold suffering as its multi-billion ongoing projects across the country risk being stalled if the Defendant forwards any adverse information to the Credit Reference Bureau.

xiii. That if the orders sought are not granted forthwith the Defendant will proceed with the sale of suit property rendering the suit nugatory and a mere academic exercise yet the plaintiff has made out a prima facie case with a probability of success.

xiv. That the Defendant does not stand to suffer any prejudice since the suit property is charged in its favour and is still holding the title document and could still be compensated by an award of damages.

3. The Application was strenuously opposed by the Defendant whose head of Legal Services Wainaina Francis Ngaruiya filed a replying affidavit sworn on 8/10/2018 raising grounds of opposition *inter alia*: that the Plaintiff is in default of its contractual obligations but has devised a strategy to mislead the court so as to obtain unequitable orders and to perpetuate its serial default; that the Plaintiff failed to liquidate the outstanding overdraft facility and the Defendant had no choice but to recall for the outstanding sums; that the Defendant is yet to exercise its rights under the charge and that the initial demand letter dated 12/09/2018 is not made under the Land Act; that this court should not interfere with or vary terms of contract entered into willingly by the parties; that the plaintiff appears to be cash strapped hence the filing of frivolous suits in an attempt at pre-empting the Defendant's rights to enforce its securities through statutory power of sale; that at no time did the Defendant refuse or frustrate the Plaintiff regarding the monies received by the Defendant on behalf of the Plaintiff since it effected the instructions given to it the letter: that the Defendant's banking operations with regard to the plaintiff were interfered with by a directive from the Central Bank not to transmit any monies and further the Plaintiff's account with the Defendant was frozen through a court order from Nairobi High Court and that the Defendant only released the monies after a consent order was obtained from the Nairobi High Court; that the Defendant was not a party to the dispute between the Plaintiff and the Nairobi County Government; that the Plaintiff has not met the conditions for grant of injunction as set down in **GIELLA =VS= CASMAN BROWN [1973] EA 358**; that the Finance Act 2012 makes it mandatory for all institutions licensed under the Act to share Credit information through licensed credit bureaus (CRB) failing which punitive action may be taken by the Regulator and therefore the Plaintiff's prayers cannot be granted.

4. The Application was canvassed by way of oral submissions. It was submitted by Mr. Njenga for the Plaintiff/applicant that the Applicant had been duly granted an overdraft facility which was being serviced by the Plaintiff until some monies belonging to the Plaintiff was wired by the County Government of Nairobi to its account with the Defendant and that the Defendant refused to release the same to the respective recipients as directed by the Plaintiff and as a result of the delay the Plaintiff suffered loss and prejudice. It was further submitted that the Plaintiff was forced to file a suit against the Defendant for damages vide **NBI HCC NO.163 OF 2018**. It was also submitted that following the filing of the suit against the Defendant, the Defendant got angered and resorted to recalling for the entire loan within 14 days failing which the Applicant would be listed as a defaulter with the Credit Reference Bureau (CRB). It was contended for the Applicant that the Defendant should be barred from listing the Applicant with the CRB and allow parties to sit down and agree.

Mr. Owino for the Defendant submitted that the Applicant does not dispute that it was granted overdraft facilities vide a letter dated 28/3/2017 and which was to subsist for twelve months but that at the end of the period the sums had not been settled. It was submitted that the plaintiff has resorted to filing a decoy suit at Nairobi High Court so as to prevent the Defendant from pursuing its lawful dues. It was also submitted that the Defendant has not even issued a statutory notice over sale of the security and hence the prayer for injunction thereon is premature, further, it was submitted that the listing of the plaintiff with the credit Reference Bureau (CRB) is an obligation which the Defendant has no control of as it is enjoined by a legal obligation regarding credit sharing regarding customers of banks. It was finally submitted that the Plaintiff has not met the threshold of a prima facie case to warrant the grant of injunctive relief.

5. I have considered the Plaintiff's Application plus the rival affidavits and annexures. I have also considered the submissions by the learned counsels for the parties herein. I find certain issues are not in dispute namely:-

- a. That the Plaintiff had been given an overdraft facility by the Defendant initially agreed at Kshs.500 million and later enhanced to Kshs.600 million as per the letter of offer dated 28<sup>th</sup> March, 2017.
- b. That the Plaintiff had a collateral in the form of Land Title No. LR No.209/2057 which was later substituted with LR. No.12867/13.
- c. That the Plaintiff failed to service the overdraft facility as it did not pay the sums due and which then forced the Defendant to send a demand notice dated 12<sup>th</sup> September, 2018.
- d. That prior to this dispute, the parties had been on good terms until the default to service the overdraft by the Plaintiff cropped up.
- e. That the Plaintiff has since filed another suit against the Defendant being NBI HCCC NO. 163 of 2018 in which the Plaintiff is claiming damages against the Defendant for the Defendant's failures to release some monies which had been wired into the Plaintiff's account with the Defendant.
- f. That the Defendant is yet to issue out the requisite statutory notice so as to exercise its statutory power of sale over the security in line with the provisions of Section 56, 90 and 96 of the Land Act 2012.
- g. That the Defendant in its demand notice dated 12/09/2018 has not only sought for the repayment of the entire sums now outstanding at Kshs.624,800,468/69 but also put the Plaintiff on notice that the Plaintiff's name will be adversely listed with the Credit Reference bureaus in line with the Central Bank Guidelines vide Banking Circular No. 1 of 2014.

Having come to the above deductions I find the issue for determination is whether the Plaintiff/Applicant has established a prima facie case with high chances of success.

The principles governing the grant of interlocutory injunctions have been set out in the case of **GIELLA =VS= CASSMAN BROWN [1973] EA 358** to wit:-

- i. Has the Applicant established a prima facie case with high chances of success;
- ii. Will the Applicant suffer irreparable damages unless an injunction is issued;
- iii. Where does the balance of convenience lie;

The above are the usual three principles enunciated in the **GIELLA** case but several other cases have cropped up with peculiar circumstances and which have compelled the courts to consider the said circumstances in line with the overriding objective of the law. In the case of **JAN BOLDEN NIELSEN =VS= HERMAN PHILLIPUS STEYA & 2 OTHERS [2012] eKLR Mabeya J cited Ojwang J** (as he then was) in the case of **SULEIMAN =VS= AMBOSELI RESORT LTD [2004] eKLR 589** as follows:-

**"I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the **Giella =Vs= Cassman Brown** case. The court must look at the circumstances of the case generally and the overriding objectives of the law. In **Suleiman =Vs= Amboseli Resort Ltd [2004] eKLR 589 Ojwang Ag J** (as he then was) at page 607 delivered himself thus:-**

**"..... Counsel for the defendant urged that the scope of the law governing the grant of injunctive relief was long ago in **Giella =Vs= Cassman Brown** in 1973 case in stone and no new element may be added to that position. I am not with respect in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement as it expands to cover new situations not exactly foreseen situations not exactly foreseen before. Justice Hoffman in the English case of **film Rover International** made this point regarding the grant of injunctive reliefs [1986] 3 ALL ER TR a page 780 – 781:- "A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong"....."**

Traditionally on the basis of the well accepted principles set out by the Court of Appeal in **Giella =Vs= Cassman Brown** the court has had to consider the following questions before granting injunctive relief:

- i. Is there a prima facie case.....
- ii. Does the Applicant stand to suffer irreparable harm.
- iii. On which side does the balance of convenience lie. Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice....."

A prima facie case has been described in the case of **MRAO =VS= FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS [2003] KLR 125** as follows:-

**“ .....in civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

Learned Counsel for the Defendant has submitted that the Plaintiff's application is quite premature in that the issue of statutory notice for realizing the security is yet to be issued and further the issue of listing the Plaintiff's name with the Credit Reference Bureau is a requirement by the Central Bank in its Bank Guidelines No. 1 of 2014. On the other hand the Plaintiff appears apprehensive about the Defendant's conduct in issuing the demand notice dated 12/09/2018.

After carefully looking at the pleadings, the rival affidavits, submissions for the learned counsels and the law applicable, the key issues that run through the Applicant's concerns at present are on the question of whether the Defendant has availed the requisite accounts to the Plaintiff and secondly whether the Defendant's intention to list the plaintiffs name with the Credit Reference Bureau is made in good faith.

As regards the issue of the accounts, it is noted that the Defendant's demand notice dated 12/09/2018 was not accompanied with the break down on the accounts relating to the overdraft in question. It was necessary for the Defendant to annex the accounts to the demand notice so as to enable the Plaintiff peruse the same and make representation or concerns if need be. The Defendant appears to have noticed the anomaly when in its replying affidavit it has attempted to annex some evidence of the accounts. This should have been availed before the suit was instituted and therefore the Plaintiff's prayer that the Defendant do render a true, proper and accurate account to the plaintiff and the court the actual status of the charge account is merited in the circumstances.

As regards the issue of the Plaintiffs name being listed with the Credit Reference Bureau, the Defendant in its notice dated 12/09/2018 made it clear that in addition to realizing the security it would forward the Plaintiff's name to the CRB. The Plaintiff has claimed that the listing aforesaid would make it difficult for it to access any funding from other institutions so as to pay up the sums owed to the Defendant and also to handle its projects.

It would appear that the Defendant's conduct in issuing the threats to the Plaintiff over the issue of listing with the CRB had been actuated by malice. This came about after the parties herein had disagreed over some monies that had been wired into the Plaintiffs account with the Defendant and which led to the filing of **Nairobi High Court Civil Case Number 163 of 2018**. It was after the filing of the said case that the Defendant issued the notice dated 12/09/2018. Due to the sour relationship between the parties the aforesaid notice is like a "Tit for Tat."

As the defendant was interested in its monies being repaid, I find the issue of the Plaintiff's listing with the CRB will cripple it and make it difficult to obtain any funds with which to repay the Defendant. It is also noted that the Defendant still holds the security which it can sell it to recover the monies, I find it rather curious as to why the Defendant opted not to proceed with the exercise of realizing the security and instead has issued threats of forwarding the Plaintiff's name to the CRB. I find this to be rather an act of spite yet the Plaintiff had been the Defendant's customer for a long time. Even though the Defendant is bound by the Bank guidelines No. 1 of 2014, the manner in which it has treated the Plaintiff leaves a lot to be desired. As to the merits or otherwise of the pending **Case Number 163 of 2018** the court dealing with it will determine whether or not the same is a decoy as contended by the Defendant herein. If the Defendant carries out its threat to have the Plaintiff listed with the CRB, I find the Plaintiff is likely to suffer great loss and damage as it will not be able to secure any funds from other financial institutions and to repay the Defendant as well as handle its projects. The balance of convenience at this stage appear to me to tilt in favour of the Plaintiff being granted injunctive relief as it stands a higher risk of injustice if the prayers 2, 3, 4 and 6 of the Application dated 25/09/2018 are not granted.

In the result the Plaintiff's Application dated 25<sup>th</sup> September, 2018 is allowed in the following terms:-

**a. Prayers 2 and 5 are premature and are disallowed.**

**b. The Defendant shall render to the Plaintiff statement of account for the overdraft loan in accordance with the terms of the overdraft agreements within the next 30 days.**

**c. The Defendant is hereby restrained from issuing or advancing any adverse notice or information to any licensed Credit Reference Bureau in regard to the Plaintiff's loan overdraft for a period of thirty (30) days from today to enable the Plaintiff organize to obtain funding and to repay the overdraft loan and or engage the Defendant over the said loan.**

**d. The Defendant upon expiry of thirty (30) days from the date hereof shall be at liberty to commence the process of realizing the security if the loan has not been paid in line with the requisite provisions of the Land Act 2012.**

**e. Each party shall bear their own costs.**

Orders accordingly.

**Dated and delivered at Machakos this 22<sup>nd</sup> day of October, 2018.**

**D.K. KEMEI**

**JUDGE**