REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 15 OF 2016

HUMPHREY MBAKA NANDI T/A

NYATI DISTILLERS LIMITED……..…….PLAINTIFF

VERSUS

EQUITY BANK(K) LTD……...……...……1ST DEFENDANT

EQUITY INSURANCE AGENCY LTD……...……2ND DEFENDANT

BRITISH AMERICAN INSURANCE

COMPANY (K) LTD……...……3RD DEFENDANT

RULING

On 10th November, 2014, the plaintiff charged his property known as **Title No. Karingani/Ndagani/1923** (herein "the suit property") to the 1st Defendant (herein "the Bank") as security for repayment of the sum Kshs 2,000,000 borrowed from the Bank. The formal charge executed between the plaintiff, the Bank and Nyati Distillers Limited (described in that charge as "the borrower") was eventually registered against the title to the suit property on 18th November, 2014.

The plaintiff and the borrower covenanted to repay the principal sum borrowed together with interest in the manner prescribed in the charge and more particularly in clauses 1 and 2 thereof. In the event of default on their liabilities, the Bank reserved the right to set in motion the process of recovery of the money due under the charge. This it could do either by suing the plaintiff and the borrower for the money due; by appointing a receiver of the income of the suit property; by leasing or sub-leasing the suit property; by taking possession of the property; or by disposing of the suit property. The exercise of any of these alternatives was, however, subject to the Land Act No. 6 of 2012 under which the charge was registered.

On 14th January, 2016, the 1st defendant opted for the last of these alternatives and sought to sell the suit property in exercise of its statutory power of sale when it turned out that the plaintiff and the borrower could not repay the borrowed sum as agreed or had otherwise defaulted in their obligations to the Bank.

This suit is primarily intended to stop the Bank in its tracks and halt sale. In the plaint dated 15th September, 2016 and filed in court on 19th September, 2016, the plaintiff who describes himself as trading under the name of Nyati Distributors Limited has sought for, among other things, a declaration by this honourable court that the intended exercise of statutory power of sale by the Bank is irregular, illegal,

null and void.

Alongside the suit, the plaintiff also filed a motion dated 15th September, 2015 in which he has asked for a temporary injunction restraining the 1st Defendant from selling or alienating the suit property pending the hearing and determination of the main suit. It is this motion that is the subject of this ruling.

The motion is stated to have been filed under **section 1A, 1B** and **3A** of the **Civil Procedure Act** (cap 21) **order 40 rule 1** of the **Civil Procedure Rules, 2010** and **section 89** of the **Land Act, No. 6 of 2012**.

According to the affidavit sworn by Humphrey Mbaka Nandi in support of the motion, on or about the 19th September, 2014 and 24th June, 2014 the Bank offered him two loan facilities in its Othaya Branch. These loan facilities were for the amounts of Kshs 2,000,000/= and 300,000/= respectively; he intended to inject these sums, as a working capital, into his company, Nyati Distributors Limited.

It was a term of contract that the plaintiff obtains an insurance cover for the loan and for the property which the plaintiff offered as security for the loan. Consequently, so Mr Nandi deposed, the 1st defendant compelled it to take the insurance cover from its subsidiary, the 2nd defendant herein; the latter in turn obtained the cover from the 3rd Defendant. The risks insured included fire, bush fire, explosion, earth quake (fire, shock and volcanic eruption) riot, strike, malicious damage and special perils as per the insurance policy. The policy was for a term of one year with effect from 22nd April, 2015 to 21st April, 2016 and the insured sum was Kshs 4,861,000. Besides this policy, the 3rd defendant also covered the plaintiff's business against loss or damage to property arising from violence for the same period.

The plaintiff swore that a deputy County Commander together with other people whom he described as "hooligans" forcefully and violently entered his distillery and damaged his plant and machinery; they also looted his property in the process. It is not clear though the county which this deputy County commander represented or the time when he entered and damaged and looted the plaintiff's property. As a result of this invasion, so the plaintiff swore, the business operations of his company were disrupted. Consequently, he could not meet his obligations under the charge.

It is the plaintiff's case that the acts of the County commander and the so-called hooligans were covered insured events for which he was entitled to indemnity from the 3rd defendant. Accordingly, he sought compensation from the defendant but in breach of the insurance contract between them, the 3rd defendant failed or refused to indemnify the plaintiff against the ensuing loss.

On the other hand, and despite his predicament, the 1st defendant has sought to realise its security and recover its loan.

While the plaintiff admits having defaulted in settlement of his obligations to the 1st defendant, he has sworn that the default has arisen as a result of circumstances beyond his control. He has deposed that he stands to suffer irreparable damage and prejudice due to what he considers as the defendant's breach of duty towards him.

Mr Sylvester Macharia, swore a replying affidavit in response to the plaintiff's application on behalf of the 1st defendant. He described himself as the 1st defendant's credit manager at its Othaya Branch. He deposed that on or about the 19th September, 2014, the 1st defendant advanced the plaintiff a loan facility of Kshs 2 million. It again advanced him another loan of Kshs 300,000/= on or about 24th June, 2015. Both facilities were secured by a legal charge over **Title No. Karingani/Ndagani/1923** registered in the name of Humphrey Mbaka Nandi trading as Nyati Distillers Ltd. The loan of Kshs 2 Million was to be repaid in 36 equal monthly instalments of Kshs 74,328/= each while that of Kshs 300,000/= was to be repaid in 18 monthly instalments of Kshs 21,167/= each.

Mr Macharia also swore that the plaintiff defaulted in repayment of the loans and as at 14th February,

2017 he was not only in arrears of Kshs 451,679.25 but he also owed the 1st defendant the sum of Kshs 2,132,475.85. He admitted that the 1st defendant was desirous of auctioning the suit property to recover its loan. He denied, however, that the 1st defendant ever compelled the plaintiff take an insurance cover from an insurance company of the 1st defendant's choice. In any event, so Mr Macharia swore, the repayment of the loan was not pegged on the success or failure of the plaintiff's business.

The parties' respective counsel made oral submissions in support of and in opposition to the motion. Ms Kinyanjui for the plaintiff reiterated the depositions in the affidavit in support of the motion but added that the 3rd defendant breached the insurance contract between it and the plaintiff to the extent that it failed to indemnify the plaintiff of the insured events. The domino effect of this failure was the default by the plaintiff to repay the loan owed to the 1st defendant. According to counsel, the only reason why the 1st defendant was sued was because it compelled the plaintiff take an insurance cover from the 3rd defendant.

On his part, Mr Kibathi for the 1st defendant urged that the plaintiff does not deny that he is in default of his obligations to the 1st defendant. In the face of such a default, so counsel submitted, the 1st defendant reserves the right to exercise its statutory power of sale. As to whether there is any relationship between the defendants, counsel submitted that the defendants are distinct and separate entities and there is no privity of contract between them.

Counsel also urged that in exercise of its right to invoke the statutory power of sale, the 1st defendant strictly complied with section 90 of the Land Act. Finally, counsel submitted that there is no evidence that the plaintiff will suffer irreparable harm if the 1st defendant disposes of his property to recover the outstanding loan. In any event, if the plaintiff was to suffer any loss, he could still be compensated in damages.

So much for the counsel's arguments.

In an application such as the one before me, all that the court has to consider at this stage is whether, first, the plaintiff has established a prima facie case with a probability of success; second, if he is likely to suffer irreparable injury that cannot be compensated in damages if the order for an injunction is not made; and, finally if the court is in doubt as to whether a case with a probability of success has been made out or that the plaintiff is likely to suffer irreparable harm if the order for an injunction is not made, then it will decide the case on a balance of convenience. This means that if the balance of convenience favours the grant of an injunction it will certainly be issued but if, on the other hand, the scales tilt against it the court will not grant the injunction **(see Giella versus Cassman Brown & Co. Ltd [1973] E.A. 358**) .

There is no doubt, and indeed it is common ground, that there exists a contract between the plaintiff and the 1st defendant. This contract which is presented as a legal charge is tripartite in nature to the extent that it has been executed by three parties; these are the plaintiff, the 1st defendant and Nyati Distillers Ltd. Although the plaintiff is described in the suit as trading under the name of Nyati Distillers Ltd and therefore the two are represented as being one and the same person, this cannot be so because they appear in the legal charge as separate and distinct persons. As a matter of fact, Nyati Distillers Ltd executed the charge as the borrower while Humphrey Mbaka Nandi executed this document as the chargor.

Be that as it may, there are obligations that flow from the contract and for which each of the three parties is responsible. As far as the plaintiff's and the borrower's obligations are concerned, they covenanted to repay the loan in the manner prescribed in the charge and in particular clause 10 thereof. The plaintiff has admitted that they could not pay the loan as agreed and therefore they defaulted in the repayments. In other words, the plaintiff has expressly and unambiguously admitted that he or they (together with the borrower) have breached the contract. In the face of such a breach, the question that arises is whether the 1st defendant can be faulted for taking the action it has taken to recover the loan. The answer to this question can only be traced in the contract itself.

It is easy to gather from the contract that at least the 1st defendant foresaw a situation where the borrower

and the chargor may default in repayment of the loan and for that reason it was careful to include in the contract a default clause in the event of such occurrence. The contract provided that in the event the chargor and the borrower defaulted on their liabilities, the Bank reserved the right to take such action as is appropriate and recover the money due under the charge. As noted earlier, according to clause 10.1 of the contract, such an action would include suing the plaintiff and the borrower for the money due; appointing a receiver of the income of the suit property; leasing or sub-leasing the suit property; taking possession of the property; or disposing of the suit property altogether.

The legality of the contract between the parties is not contested and thus it follows that the parties to the contract including the chargor and the borrower were bound by the terms of this contract which obviously include the default clause. Simply put, the borrower and the chargor are bound by the terms of the contract to which they covenanted. And where they are so bound, this court cannot to stand in the way of enforcement of the contract and purport to halt or suspend any of its terms including such terms as relating to any remedial action taken by either of the parties whenever there is a breach more so if such an action is clearly consistent with the terms and conditions of the contract.

It must also be noted that an injunction is an equitable remedy and as such he who seeks it must approach a court of equity with clean hands. Having admitted that he has breached the contract between him and the 1st defendant, the plaintiff's hands are obviously soiled and with his hands in this state, this remedy cannot be available to him.

The plaintiff attempted to link his failure to repay the loan with the 3rd defendant's alleged default to indemnify him as a result of what he alleged to be the occurrence of insured events or insured risks covered by an insurance contract between them. As far as I can gather, there is no evidence, at least from the material before me, that there was any link between the 1st defendant and the 3rd defendant. They are separate and distinct entities and there can be no clearer evidence of this than the fact that they were sued in their independent capacities. Again, although the plaintiff alleged that the 1st defendant compelled it to take an insurance cover from a specific insurance company, I have not found evidence of such influence from the 1st defendant in the charge. The closest that the 1st defendant came to in identifying a particular insurance company for insurance purposes is clause 6.10 according to which the obligation to insure and keep insured the charged property is placed upon the chargor. That clause reads in part:

> ***6. In addition to the agreement by the Chargor and/or the Borrower implied by section 88 of the Land Act, the Chargor and/or the Borrower hereby further covenant and agree with the Bank that during the continuance of this charge the Chargor and/or the Borrower will:***
>
> ***6.10 (i) at the expense of the Chargor insure and keep insured for such amounts and with such insurers as the Bank may from time to time in writing select: -***
>
> ***(A) all buildings being or forming part of the Charged Property and such other property and effects of an insurable nature (whether affixed to the freehold or leasehold or not) being or forming part of the Charged Property as the bank shall at any time and from time to time require to be insured against loss or damage by fire aircraft storm earthquake riots and civil commotions and such other risks as the Bank may determine in the full insurable value thereof(which expression shall include but not be restricted to the full replacement value thereof and shall include all architects' and surveyors' fees) as determined by the Bank from time to time;***

I do not understand this clause to be compelling the chargor to take insurance cover for the charged property from any particular insurance company; rather, I understand it to say that the Bank provides a pool of insurance companies from which the chargor may select one for a cover for the charged property.

I would add that if the plaintiff was to suffer any loss as a result of the 3rd defendant's failure to indemnify it against the loss arising from the risks covered by the insurance policy, he should be able to enforce the insurance contract and recover the sum insured or otherwise recover damages for breach of the insurance contract. However, the fact that he may have a sustainable suit against the 3rd defendant

cannot hamper the enforcement of the contract between him and the 1st defendant. As noted, the 3rd defendant was not privy to the contract between the plaintiff and the 1st defendant and neither was the 1st defendant privy to the contract between the plaintiff and the 3rd defendant. In any event the performance of the plaintiff's obligations under the charge was not conditional upon the performance of the 3rd defendant's obligations to the plaintiff under the contract between them.

In conclusion, therefore I would say that the plaintiff has not demonstrated to my satisfaction that his suit against the 1st defendant has a probability of success. I am also not satisfied that he is likely to suffer irreparable damage which cannot be compensated in damages if the order for an injunction is not made. I am accordingly inclined to reject the plaintiff's motion dated 15th September, 2016 with costs to the 1st defendant. It is so ordered.

Signed, dated and delivered in open court this 28th day of July, 2017

Ngaah Jairus

JUDGE