



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 382 OF 2015

CHRISTOPHER MBOTE CHEGE..... PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. Many of the facts surrounding the matter now before Court are common ground.
2. Barclays Bank of Kenya Limited (The Bank or Defendant) granted certain facilities to Mbote Beer Distributors (The Company or Borrower) and a charge for Kshs.20,000,000/= over Land reference LR. NO.13537/312 Ithuri Farm taken as security thereof. This property is registered in the name of Christopher Mbote Chege (The Plaintiff herein). The Plaintiff is a Director of the Company.
3. The Plaintiff admits that the Company has defaulted in the payment of the facilities. The Plaintiff thought that, as at 4th August 2015, the amount to be over Ksh.30,000,000/=. The Bank asserts that the debt stood at Kshs.37,612,131/= as at 31st May 2016. The concession by the Plaintiff shall be revisited at some point in this decision!
4. In the Plaintiff presented to Court on 4th August 2015, the Plaintiff complains that the Bank has attempted to exercise its statutory power of sale without resort to other remedies available to it. This includes pursuing the Company first as a principal debtor or appointing a Receiver over its assets. The Plaintiffs contention is that the Banks action is illegal, unlawful and against the statutory provisions and terms of the Guarantee.
5. In that Plaintiff, the following prayers are sought:-
 - a) A declaration that the intended sale by public auction and/or in any way of realizing from security being LR.NO.13537/312 (IR.NO.83246) is illegal, unlawful and against statutory provisions of the guarantee between the Defendant and the Plaintiff.
 - b) A perpetual injunction restricting the intended sale of title LR. NO.13537/312 (I.R. NO.83246) that it be stopped, discontinued and suspended pending the hearing and determination of this suit.
 - c) The Plaintiff further prays that the Defendant does appoint a receiver manager for the Mbote Beer Distributors limited pending the hearing and determination of this suit.

d) General damages.

e) Any other of further relief.

6. The suit is resisted. What is now before Court for determination is the motion dated 4th August 2015 for the following orders:-

c) That the Honourable Court be pleased to grant an order of injunction restraining the Defendant, its servants, agents and/or any persons claiming through it from selling, alienating, disposing and/or in any other way dealing with title LR. NO.13537/312(I.R.83246) till the hearing and determination of this application and suit.

d) That the Honourable Court be pleased to order for appointment of receiver manager for Mbote Beer Distributors limited pending the hearing and determination of this application and suit.

e) That cost be provided for.

7. The Court has considered this motion in the light of the pleadings, application itself and the submissions filed herein.

8. Parties are bound by their pleadings. Neither in the pleadings nor in the application does the Plaintiff complain that the Statutory Notices issued by the Bank are defective for non-compliance with form or time. This Court will therefore not entertain the Plaintiff's attempt to expand the matter by arguing that the Notices do not comply with Section 96 of The Land Act.

9. In determining whether or not the Plaintiff has established a prima facie case with a probability of success this Court must discuss the viability of the Plaintiffs assertion and argument that the Bank must exhaust other remedies available to it before resorting to its statutory power of sale. The suggested remedies are pursuit of recovery from the Company or appointment of a Receiver manager over the business of the Company.

10. But what the Plaintiff has failed to do is to point out any agreement between it and the Bank or a statutory provision that obligates the Bank to pursue those remedies first.

11. Under the terms of the Charge document of 7th April 2003 and the further Charge of 15th May 2006, the Plaintiff covenanted to pay the bank any amounts that would be due and owing from the Company. The Plaintiff admits that the Company has fallen back on its obligations and the company is justly and truly indebted to the Bank in a sum in excess of Ksh.30 million. There is evidence that Bank has demanded the debt from Company. See the letter of demand of 16th April, 2014.

12. In addition, the Letter of Guarantee and Indemnity signed by the Plaintiff has this express provision,

“The Guarantor waives any right it may have of first requiring the Bank (or any trustee or agent on its behalf) to proceed against or enforce any other rights or security or Claim payment from any person before claiming from the Guarantor”.

I am afraid I cannot see much strength in the centerpiece of the Plaintiff's case. I cannot say that it has made out a prima facie case with a probability of success. The Plaintiff's application for Injunction fails the first test in the case of **GIELLA VS. CASSMAN BROWN** [1973] EA 358 which sets out the conditions for the grant of an Interlocutory Injunction as being:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient, and cannot go any further.

13. The application of 4th August 2015 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 29th day of September, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Azenga h/b for Muturi for Plaintiff

Akonga h/b for Thiga for Defendant

Alex - Court Clerk