



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 276 of 2016

TULLA RESERVE SUPPLIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1st DEFENDANT

MUSA A. ADAN2ND DEFENDANT

CENTRAL BANK OF KENYA.....3RD DEFENDANT

RULING

1. This is a Notice of Motion. It is dated 12th July 2016 and seeks the following orders:-

a) *Spent*

b) *Spent*

c) *Spent*

d) *Spent*

e) That pending the hearing and determination of this suit an order of injunction do issue restraining the Defendant from either by itself, employees, servants or agents from referring and/or listing the Plaintiff or any of its Directors' negatively with the Credit Reference Bureau (CRB), on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.

f) That pending the hearing and determination of this an order do issue directing the release to the Plaintiff of all monies withheld by Unga Limited on the strength of instructions from the Defendant.

g) That pending the hearing and determination of this suit an order of Injunction do issue restraining the Defendant either by itself, employees, servants or agents from demanding payment or exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect of all property known as No.7918/731 (IR No.6442) on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.

h) That the costs of this application be provided for.

2. The Motion is brought against the backdrop of proceedings commenced by a Plaintiff filed herein on 13th July 2016, but amended on 12th August 2016. Tulla Reserve Supplies Limited (The Plaintiff or Tulla) is a customer of National Bank of Kenya Limited (The 1st Defendant or Bank).

3. After negotiations, the Bank on 24th November 2014 offered Tulla working capital of Ksh.245,600.00/= for a term of twelve months. Tulla avers that the facility was an Islamic Banking product under the name "Investment Musharaka". The following securities were created upon the grant of the facility:-

(a) Charge for Kshs.175,000,000.00 dated 2nd December 2014 registered as IR No.6442/3.

(b) Joint and several guarantees of Kshs.245,000,000.00 by the Directors of the Plaintiff.

(c) Deed of assignment of receivables from Unga Holdings Limited and Kenya Prisons.

(d) Irrevocable letters of undertaking from the respective employers to channel contract proceeds through the Plaintiff's account at National Bank.

(e) Deed of subordination of Directors loans of Kshs.11,672,489.00.

4. Tulla avers that the following are some of the highlights of the facility.

a) Tulla and the Bank would share profit at a ratio of 55.3 : 44.7.

b) The Investment by Tulla and Bank was to facilitate supply contracts which Tulla had with Kenya Prisons Unga Holdings Limited and The World Food Programme (WFP).

c) The agreed projected rate of return was 18.5% p.a.

d) The projected profit was Kshs.56,499,899.20.

5. Tulla further states that only Kshs.145m and not Kshs.245m as agreed under the Contract was disbursed and this was a complete failure of consideration on the part of the Bank.

6. A further allegation by Tulla is that the Contract was a breach of sections 11,12 and 44a of the Banking Act and Islamic Sheria Law and was therefore null and void abinitio.

7. It is Tulla's case that it has regularly serviced the facility by making payments into an escrow account opened for that purpose but that the Bank makes a claim of Kshs.225,029,777 which is unilateral, excessive, oppressive and exorbitant.

8. Tulla asserts that the initial principle drawdown was only Ksh.145m and subsequent drawdowns were from its own funds and not from the Bank. It further accuses the Bank of closing its accounts and unlawfully and without consent or notice opening new accounts being account numbers 302,303,304,005-001,005-002, 3,4 to 68.

9. The Amended Plaintiff contains instances of what Tulla sees as non-compliance of legal provisions and banking prudential guidelines. For example, it avers that the Bank changed the profit rate from 18.5% to 19.5% contrary to Banking laws, Banking practices and Islamic Sheria Laws. Tulla further asserts that the Bank was purporting to carry on the business of Islamic Banking and finance without any regulations under the Banking Act or in accordance with known Islamic practices or the Koran.

10. In the end Tulla grieves irreparable loss, damage and injury and seeks judgement for the following

multiple prayers:-

Declaration that the 1st Defendant is in breach of its duty and obligations under the facility letters and loan agreements.

a)(i) A declaration that the financing contract between the Plaintiff and the 1st Defendant is null and void ab initio.

(1) An order that the 1st Defendant do release forthwith all the funds standing and owing to the Plaintiff's together with interest thereon at loan rates from the date of deposit.

b)(2) Special damages against the defendant for Kshs. 3,786,328,352.49 as particularized in paragraph 22A of this Plaintiff.

c) A declaration that the Plaintiff and its Directors are under no obligation to make loan repayments on account of the 1st Defendant's breach of its duty and obligations under the loan agreement.

c)(1) A declaration that no event of default has occurred or arisen. Consequently the 1st Defendant is not entitled to exercise its legal rights under the securities or at all.

d) An order of Injunction restraining the 1st Defendant from either by itself, employees, servants or agents from demanding payment or exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect of all property known as LR No.7918/734(IR No. 6442) on account of any loan facility advanced to it by the 1st Defendant that forms the subject matter of this suit.

e) An order of Injunction restraining the 1st Defendant from either by itself, employees, servant or agents from referring and/or listing the Plaintiff or any of its Directors negatively with Credit Reference Bureau (CRB), on account of any loan facility advanced to it by the 1st Defendant that forms the subject matter of this suit.

f) An order of mandatory injunction directing and/or compelling the 1st Defendant to release and/or unconditionally discharge all securities it holds on account of the loan facilities advanced to the Plaintiff including but not limited to:

i. Discharge of title LR No. 7918/734[IR No.6442).

ii. Discharge of the directors from any liability arising from any guarantees executed pursuant to any facilities advanced by the Defendant and which forms the subject of this suit.

g) A refund of all monies found to have been illegally charged on the Plaintiff's account(s) or any account associated with the Plaintiff and touching on this suit.

g) (1) An order directing the 3rd Defendant to declare the 1st Defendant is not an Islamic bank but a conventional bank.

g(2) An order directing the 3rd Defendant to enforce the Banking Act and close all National Amana banking practices.

h) General Damages and punitive damages be awarded to the Plaintiff as against the Defendant for breach of its fiduciary duty, breach of contract, loss of business, coercion and undue influence, misappropriation of funds, negligence, misrepresentation and breach of banking law and regulations.

i) Costs of this suit.

j) Interest on (g) (h) and (i) at court rates.

k) (1) Interest on (b)(2) and (b)(3) above at the 1st Defendant's applicable lending rates.

l) Such other or further relief as this Honourable Court may deem fit.

11. In an Amended Defence filed on 16th November 2016, the Bank denies breach of the Banking Act and Islamic Sheria and states that the loans were under a revolving facility and the Bank has advanced Tulla a total loan of Kshs.922,168,215 at a profit return rate of 19.5% p.a of which Kshs.737,384,969.12 has been repaid leaving a balance of Ks.248,817,946. It denies that the amount sought is illegal, exorbitant, oppressive or unilateral.

12. On the question of rate of return, the Bank avers that the rate of return was varied from 18.5% pegged on 90 days to 19.5% p.a pegged on 150 days at the request of Tulla which was unable to repay the loan within the prior agreed period of 90 days.

13. On the issue of accounts, the Bank explains that, every drawdown attracted its own tenure of repayment for that reason a new account was opened for each drawdown and once repaid, the account was closed. The Bank asserts that the accounts were loan accounts for which the prior authority of Tulla was not required.

14. The Motion is supported by the affidavit of Diba Hussein Dado sworn on 12th July 2016. He is the Managing Director of Tulla. He rehashes the contents of the Amended Complaint.

15. To support the allegation by Tulla, an Auditor's Report is annexed to the affidavit. This Court shall make comments on this report as it determines the application.

16. There is then the issue of some money (in excess of Ksh.70m) held by Unga Ltd on Supplies by Tulla. Because of the dispute between Tulla and the Bank, Tulla does not want Unga to remit the monies to the Escrow Account opened for purposes of servicing the facility. However the Defendant has threatened Unga with legal action if the funds held are released to the Plaintiff. (See the letter of 27th May 2016 page 53 of the Plaintiffs Bundle). It is for this reason that Tulla seeks the intervention of the Court requesting for an order for the release of the money to itself.

17. Tulla explains that the funds held by Unga are necessary and critical for the survival of its business. Tulla asserts that the property, LR No.7918/731, currently held by the Defendant as part security is valued at Ksh.700,000,000/= which is more than sufficient to cover the alleged debt of Ksh.228,029,777.00 and the release of the funds cannot possibly prejudice the Bank.

18. The Bank opposes the application and sets out its answer in the Replying Affidavit of Leonard Obura sworn on 1st August 2016. Just like Tulla, the Bank reiterates the contents of its pleading. The deponent highlights the following. That the facility granted to Tulla through the Letter of Offer dated 20th November 2014 was a revolving facility in the sum of Kshs.245,600,000/= and that between December 2014 and February 2016 the Plaintiff drew on the revolving facility a total loan of Kshs.922,168,215.95 of which Kshs.737,388,969.10 has been repaid. That a debt of Kshs.248,817,946.75 remains which comprises a principal sum of Ksh.228,029,776.17 and profit of Ksh.20,788,70.61.

19. The Application before Court is for orders of Interlocutory Injunction and must, as usual, be considered on the principles laid down in **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.

20. I understand the case for Tulla to be predicated on the following main planks:-

(i) That the facility granted to it was a term loan and not a revolving facility or in the very least its nature was uncertain.

(ii) Although the facility was for Kshs.245m the drawdown allowed was for only Kshs.145m.

(iii) The profit sought and worked out by the Bank was on a presumed drawdown of Kshs.245m and not the actual amount allowed that is, Ksh.145m.

(iv) The Bank opened unlawful and illegal Bank Accounts which facilitated the illegalities perpetrated by the Bank.

(v) The agreed rate of return was unlawfully increased from 18.5% to 19.5%.

(vi) The contract between Tulla and the Bank infracts the Banking Act (specifically Sections 11,12 and 44A) and Islamic Sheria law.

21. As this Court assesses the viability of the Plaintiffs case it must remember that it cannot, at this interlocutory stage, make firm findings that may embarrass the Trial of this matter.

22. The contract between Tulla and the Bank can be referred to three critical documents. The facility letter of 20th November 2014, the addendum thereto of 28th May 2015 and the renewal of 28th December 2015.

23. The facility of 20th November 2014 was a work capital financing agreement for a term of 12 months in which the Bank would invest Ksh.245m. This investment is really the amount to be granted by the Bank. The agreed rate of return was 18.5% pa. The monies drawn down would be repaid within a maximum period of 90 days.

24. It would seem that Tulla was having a difficulty repaying the drawdowns within 90 days and hence a renegotiation that culminated in the addendum of 28th May 2015. A highlight of the addendum was that the repayment period was increased to a maximum period of 150 days or when the employer pays the specific LPO whichever is earlier. Another was that the profit rate was revised upwards to 19.5%.

25. On 28th December 2015 the parties signed into a new working financing agreement. The Bank investment being Kshs.240,000,000/- at an agreed projected rate of return on that investment at 19.5% pa. In the latest arrangement each drawdown was to be repaid in a bullet (principle plus profit) within 180 days.

26. Whilst the Tulla's Counsel argued that the facility was a term loan and not a revolving facility, the three contracts cited above seem to give a different testimony. First, the purpose of the facility was to assist Tulla to service supply contracts with Kenya Prisons, Unga Holding Ltd and WFP (jointly the Employers). From the conditions precedent to the letters of offer (clause 3 of letter of 20.11.2014 clause 5 of letter of 28.12.2015 clause 8 of letter o 28th December 2015) the drawdowns were to be made against authenticated LPOs given by the employers which would be accompanied by irrevocable letters of undertaking from the employers to channel the proceeds through the Bank. Second, each drawdown would be repaid within a maximum period of 90 days increased to 150 days then eventually to 180 days. It would seem, at least from the evidence upto now, that the facility was a revolving fund and the contracts speak to this.

27. Was the entire facility granted or was it only Kshs.145 million as asserted by Tulla? The Bank's position is that it disbursed the entire facility, that is, Kshs.245m. Who is to be believed? Whilst the answer to this question should, as others, await the Trial, I find the following observation by Auditors commissioned by Tulla to be unhelpful to Tulla's held position,

"2.2.71 The statements forwarded in respect of the account were from 8th September, 2014 – 22nd May 2015.

The cumulative transactions in the account were Kshs.606,383,243.45 debit and Kshs.606,383,243.45 credit.

2.2.7.2 Revolving Loan Principal Disbursements in account 300

The 1st amount of loan principal was disbursed on 11th December 2014 of Ksh. 145,000,000

15.01.15	58,620,000
15.02.15	20,000,000
17.02.15	30,000,000
25.02.15	30,000,000
04.04.15	50,000,000
02.04.15	10,900,000
17.04.15	<u>50,000,000</u>
Total principal drawdowns	<u>394,520,000</u>

Total additional drawn down – Account 300

2.2.7.4 Total principal loan drawdown Account 300

We noted with that upon explanation availed to by the bank, the statements of account in respect of Account No – 300 indicated the total principal loan draw down sum of Kshs. (245,000,000+149,520,000)=394,520,000 as at 30th April 2015.

The total loan drawdown exceeded the agreed contracted sum of Kshs.245,000,000 by Kshs.149,520,000 over and above the amount agreed upon as per letter of offer.

The bank did confirm to us in our two meeting that they had employed their workings on the basis of a revolving facility as opposed to a term product".

To be observed from this Audit Report is that between 11th December 2014 and 17th April, 2015, the Bank had made principle disbursements of atleast Kshs.394,520,000/- to Tulla. That would be under the first facility Letter. What Tulla's own Auditors are saying is that the principle drawdowns were infact in excess of Kshs.245m contracted.

28. On the basis of the evidence at hand, Tulla has failed to make a prima facie case in respect to the fulcrum of its case that the facility was a term loan and was not disbursed.

29. I turn to the Accounts opened by the Bank which Tulla assert were unlawful and unauthorized. The

explanation given by the Bank for these was as follows:-

(i) In answer to paragraph 14, I deny that the accounts were unilaterally closed without the knowledge of the Plaintiff of that another account was wrongfully opened without its knowledge. On 27.4.2015, all Amana customer accounts previously held in the conventional system (BFUB) were migrated to the Sharia Compliant IMAL system upon sufficient notice to all customers, copy of notice is annexed and marked "LO-4". The Plaintiff's account balances or signatories did not change and it continued to bank and use same cheque book. No loss or inconvenience was occasioned to the Plaintiff.

(j) In reply to paragraph 15, I wish to state that every drawdown on the revolving facility attracted its own tenure of repayment for which reason a new account was opened upon fresh disbursement. The closure of account brought to an end the previous loan and fresh drawdown opened a new account. This procedure was well known to the Plaintiff and no loss or inconvenience has been occasioned to the Plaintiff.

30. Tulla's Auditors draw the following conclusions in respect to the opening of the Accounts:-

a. From the above transactions, it was evident that the bank created multiple accounts without the knowledge or consent of the company.

Account No. 005-001 was irregular and was never legally binding on the company as the account was not sanctioned by the board.

b. There existed other multiple accounts were made in the names of Tula Reserves Supplies Limited and were only generated upon the company's demand for the Company's loan statement of account.

c. Other than the legitimate accounts that the company officially opened – 300 & 301, there were several illegitimate and irregular accounts from Account Nos 01196056947302-304 as at April 2005 and later on account 0203-404-201103-10000005-1,-68.

d. We received assurances from the board of directors that other than the two legitimate accounts opened and operated by the company, the other accounts were illegitimate as the board of directors never sanctioned the same and not certified legal documentation was ever requested from the company to ratify or legalize the said accounts with respect to any operation as per the requirement of CBK Prudential Guidelines, 2006, for institutions licenced under the Banking Act.(pg 129, 4.3.1.3)

e. From the available certified statements of accounts, funds were revolved from the escrow account to operating account ad vice-versa. The net effect was that a huge cumulative figure of Kshs.922,168,215.95 was realized with a profit figure of Kshs.43,216,184.88.

We also noted that although a profit amount of Kshs.25,239,265.60 was determined as chargeable at the end of the 12 months term, the actual profit that was actually charged at the end of the first 12 months was Kshs.31,973,881.56.

f. The revolved funds amounted to Kshs. 922,168,215.95 with an additional profit figure of Kshs.43,216,184.88 out of which the Company settled Kshs.737,384,969.17.

g. The only legitimate funds that the Company officially received from the banks own coffers were in respect of the first loan Drawn down Ksh.145,000,000 which on a prorate basis generated profit of 1,398,923.80pm which added up to Ksh.25,180,632 for the 18 months.

h. At no time in the course of the 18 months period did the company require an additional funding within the threshold of the facility, neither did the business require additional funding equivalent to

245 million.

31. Even if it is accepted, arguendo, that the accounts were unlawful, Tulla bore the onus of demonstrating that the accounts were used to overcharge it or otherwise to draw into its funds. No such evidence was forthcoming.

32. Short comments on two other matters. The profit rate was changed from 18.5% pa to 19.5%. This is common ground. It was however not unilateral as it was agreed upon by the parties just as they agreed to a variation of the repayment period. See the Addendum letter of offer dated 28th May 2015 making these variations

33. As to how the contract contravened Sections 11,12 and 44A of the Banking Act or the Sharia Law, the application lacked elaboration and the Plaintiffs' submissions was singularly silent on it. No contraventions are apparent to the Court.

34. This Court does not find that the Plaintiff has made out a prima facie case with a probability of success. The Motion of 12th July 2016 must therefore fail. It is hereby dismissed with costs.

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

F. TUIYOTT

JUDGE

PRESENT;

Arende for Plaintiff

Makambo h/b Ojiambo for 1st & 2nd Defendants

Kirimi h/b Chege for 3rd Defendant

Alex - Court Clerk