



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 268 OF 2015

JAVAID IQBAL KHAN.....PLAINTIFF

VERSUS

IMPERIAL BANK LIMITED.....DEFENDANT

RULING

1. By a **Notice of Motion** Application dated and filed herein on 4<sup>th</sup> June 2015, the Plaintiff seeks to secure with costs an order of temporary injunction restraining the Defendant or its agents from selling or in any way disposing off or interfering with the suit property until this suit is heard and determined.
2. The Application is premised on the grounds set out therein, and is supported by the affidavit of the Plaintiff JAVAID IQBAL KHAN sworn on 4<sup>TH</sup> June 2015.
3. Mr. Khan depones that he is the Applicant and the registered owner of flat Number C 1 erected on L.R. No. 1870/111/557 (I.R. No. 105843) (herein the suit property). The Applicant in April 2007 Guaranteed a loan of Shs.8,000,000/= which was offered to his company IQBAL TRANSPORTERS LIMITED by the defendant. To secure the said loan the Applicant executed a charge in favour of the Defendant over the suit property, but claims that todate he has never been given a copy of the charge. The Applicant depones that the defendant is now claiming Kshs.72,540,009.79 without explaining how the same has arisen. Besides, the Applicant states that the bank has already applied USD 50,000/= that was in a Fix Deposit Account towards the said loan account as well as having received a further sum of Kshs.9,633,300/= on the same account. Further, the Applicant depones that the bank has refused to give him account statements so that he can see how the sum of Shs.72,540,009.79 was arrived at. The Applicant further states that the bank has threatened to sell the suit property without providing Statutory Notice as required by Law. The Applicant also states that the Defendant charged the applicable interest rate without informing him, and that this was illegal. On those grounds the Plaintiff/Applicant prays for an order of injunction to stop the defendant from selling the suit property.
4. The Application is opposed by the Defendant through a Replying Affidavit sworn by MARY WANJIRU on 14<sup>th</sup> July 2015. The deponent states that the Plaintiff herein has been a customer of the Defendant ("the Bank") through his company, Iqbal Transporters Limited for many years and have enjoyed a Bank-Customer relationship over the years; as such the Plaintiff's company has enjoyed credit facilities offered from time to time by the bank on its current account number 0121857014 in the name of Iqbal Transporters Limited vide a letter of offer dated 25<sup>th</sup> April 2007 the bank granted the borrower, Iqbal Transporters Limited an overdraft facility of Kshs.8,000,000/= to be utilized for working capital, wherein the Plaintiff signed the said letter of offer both as a director of the borrower and as a guarantor to the said facility. (The deponent annexed and marked "MW 1" a copy of the letter of offer).
5. The Respondent's case is that the Plaintiff as a guarantor was aware as at the time of executing the letter of offer of existing liabilities which the borrower was indebted to the Bank in the sum of Kshs.3,604,303.70 and USD 21,006.35 as at 25<sup>th</sup> April 2007. This is clearly demonstrated under clause 2 of the said letter. The Plaintiff executed the said letter of offer to signify his acceptance of the terms thereof. The Plaintiff voluntarily offered his house Apartment No. C1 erected on Land Reference Number 1870/III/557, Nairobi as security to the said facility and a legal Charge over the said house dated 9<sup>th</sup> July 2007 and registered on 16<sup>th</sup> July, 2007 in favour of the Defendant was created. **(The Respondent Annexed and annexed and marked "MW 2" and "MW3" copies of the Charge and guarantees and indemnity respectively.)**
6. The Respondent stated that an overdraft facility is not a one off credit facility into a borrower's account but an arrangement whereby a borrower is allowed to draw moneys from a debit account from time to time with consistent repayments. The borrower herein continued presenting cheques for payment by the Defendant Bank which cheques were paid on its behalf and

applied/requested on several occasions and was given further accommodation by the Defendant through increased overdraft facilities on the said account but the borrower and/or the Plaintiff did not liquidate the account hence interest debits and interest continued to accrue on the account until the current sums. **(The Respondent annexed and marked "MW 4" copies of the said requests.)**

7. The Respondent's case is that it was a term of the overdraft facility that the applicable rate of interest was 16% per annum with an additional default penalty interest of 9% per annum as captured under clause 6 of the letter of offer and the right of the Defendant to vary the rate of interest was reserved in the said clause. The Charge also captured in clear terms the interest to be levied on the facility and reserved the Defendant's right to in its sole discretion determine the rate or rates applicable as evidenced under clause 3(a) of the said Charge Instrument. However, when the Defendant decided to alter the interest rate(s) the same was duly communicated to the borrower. The Plaintiff was well aware of this development contrary to his denial of the same in paragraph 5 of his Supporting Affidavit sworn on 4<sup>th</sup> June, 2015. **(The Respondent annexed hereto and marked "MW 5" a copy of such notification).** At no time did the Borrower requested for statements of account and was denied.

8. However, the borrower defaulted and has continuously defaulted in liquidating its account with the result that the same was outstanding at Kshs.72,540,009.76 as at 31<sup>st</sup> March 2010. **(Annexed and marked "MW 6" is a copy of the statement of account).** The Respondent's case is that on the said account becoming non-performing, interest was suspended the effect being that it continues to accrue but does not reflect in the account as per the Central Bank Prudential Guidelines on Asset Classification and Provisioning loans. A recalculation of the suspended interest from 12<sup>th</sup> January 2011 show an outstanding suspended interest in the sum of Kshs.59,422,741.22 which remains due and payable to the Defendant.

9. The Plaintiff and his co-director have on several occasions offered proposals on how to pay off the outstanding debt incurred by their said company but to no avail. The Respondent submitted that the persistent default coupled with failure to honour the various proposals to regularize the borrower's account with the Defendant has given rise to exercisability of the Defendant's Statutory Power of Sale. On demand and subsequent issuance of a compliant statutory notice, the Plaintiff has intimated willingness to negotiate but such negotiations have not been fruitful leaving the Defendant with no option than to pursue legal and recovery remedies within its reach.

10. Parties filed submissions. The Applicant filed submission on 12<sup>th</sup> October 2015 and Supplementary Submissions on 25<sup>th</sup> January 2016, while the Respondent did the same on 11<sup>th</sup> November 2015. I have considered the Application, and the said Submissions. In my view the following are the issues for determination.

*i. Whether the Plaintiff/Applicant was given the loan facilities upon terms which can be ascertained.*

*ii. Whether there is a debt due to the Defendant by the Plaintiff.*

*iii. Whether there is a valid Statutory Notice served upon the Defendant.*

*iv. Whether the Applicant has satisfied the case law principles for the ground of Temporary Injunctions.*

11. On the issue number one above, this court's attention is drawn to the Letter of Offer dated 25<sup>th</sup> April 2007 being exhibit "MW1"0 to the Replying Affidavit of Mary Wanjiru. The offer is for an overdraft facility of Shs.8,000,000/=. The Borrower and Guarantors acknowledge at clause 2 that the Borrower is indebted to the Bank in the sum of Kshs.3,604,313.76 and USD 21,006.35 as at 25<sup>th</sup> April 2007, being the existing liability. It is therefore not correct to state, as the Plaintiff does, that the loan was for Shs.8,000,000/= only which has since been paid. In fact the Plaintiff chose to hide from this court the Liabilities which existed before the said loan was granted on 25<sup>th</sup> April 2007. On the issue of interest, Clause 5 of the letter of offer states that applicable interest rate would be 16% p.a. while at Clause 6, the default rate would be 9% p.a. over and above the lending rate. It is therefore not correct the submissions by the Plaintiff that the Defendant changed the interest rate. The terms of the Letter of Offer were eventually carried into the charge which was subsequently drawn and executed by the parties as per annexure "MW2" to the Replying Affidavit of Mary Wanjiru. At Clause 5 of the Letter of Offer the Defendant had reserved the right to vary applicable interest rate without any advice to the Borrower. Even then when the bank increased the interest from 16% to 18%, the bank duly notified the Plaintiff through its letter dated February 25 2009 annexed as "MW5" to the Replying Affidavit aforesaid.

12. I am persuaded to believe the defendant when it stated that the overdraft facility was not a one off credit facility into the Borrower's account but on arrangement whereby the Borrower was allowed to draw moneys from a debit account from time to time with consistent re-payment. I believe that the Borrower herein continued to presenting cheques for payment by the Defendant bank which cheques were paid on its behalf occasionally upon request. I say this because apart from the aforesaid letter of offer and the charge, there is evidence that the Applicant occasionally asked for more funds. By their letter dated 28<sup>th</sup> December, 2010, annexed as "MW4" to the Replying Affidavit aforesaid, the Borrower requests the bank and states as follows;

**"we hereby request you to kindly restructure our facility to term loan up Shs.50.0M and an additional overdraft facility of Shs.30.0M against security of Camp North Ltd"**

By their letter of 23<sup>rd</sup> March 2009, the Borrower applied for a term loan of Shs.15 Million to be repaid in 4 years, while by their letter of October 2 2008, the applicant requested for a renewal of **"current facilities for a further period of one year to a limit of Kshs.20,000,000"**. While this court cannot at this stage be sure whether the above requests were granted, the court is however satisfied that the relationship between the parties went beyond the letter of offer of 25<sup>th</sup> April 2007.

13. The second reason why I am persuaded that the Plaintiff was given the above facility is the apparent admission by the Plaintiff/Applicant of his indebtedness. By 17<sup>th</sup> December 2011, the Plaintiff had acknowledged that his company owed the bank Shs.82,190,104.80. I herewith duplicate the content of that letter.

**We refer to the above account which is currently overdrawn by Kshs.82,190,104.80. This has been occasioned by the fact that in the past years our creditors namely World Food programme have not been paying regularly and have been delaying which we are following up continuously and this has made it very tough for us and such we have not been able to service the account as we would have wanted.**

**Our business is currently on a recovery path and it is our hope that the year 2012 will be much better business wise because of this that we would like to request the bank:**

- **To allow us to make repayment of Kshs.500,000/= every month commencing 30<sup>th</sup> Jan 2012.**
- **To kindly suspend the interest and penalty interest accrued on to the account which is currently charged**
- **to approximately Shs.2.0 million monthly to enable us first pay off the Principle Outstanding.**
- **To convert the facility to a term loan with the above indicated instalments to be paid on the 30<sup>th</sup> every month.**

**We would like to offer the following as security for the facility;**

- **Logbooks for motor vehicles KBA 786G and KAZ 222M both valued at around Shs.6 million.**
- **The FDR's you are holding currently.**
- **Full charge on our property in Westland's currently valued at around Kshs.23.0 M (title already with you).**

14. There is also a letter by the Plaintiff to the Defendant dated October 13, 2014 in which the Plaintiff appears to have acknowledged that Shs.72,540,009/76 was owed to the Defendant and in which the Plaintiff pleads with the Defendant for some considerations before he starts the settlement process.

15. The third reason why I am convinced that the Plaintiff owes a debt to the Defendant is that upon the receipt of the Statutory Notice, the parties agreed to enter into negotiations, and the Defendant put on hold the Statutory Notice. In my view a party like the Applicant herein who claims to owe nothing to the Defendant cannot now purport to enter into negotiation on a claim of Shs.72,000,000/=. Why even think about any negotiations when you owe nothing!

16. It is therefore the finding of this court that the Plaintiff/Applicant herein was given financial facilities by the Defendant upon terms which are ascertainable from the letter of offer dated 25<sup>th</sup> April 2007, and the subsequent charge registered on 16<sup>th</sup> July 2007. The Plaintiff/Applicant has since defaulted in the repayment of the loan, and in answer to issue number two raised above, the Plaintiff owes a debt to the Defendant.

17. In answer to issue number three above the finding of this court is that the Defendant lawfully served the Plaintiff with a Statutory Notice on 20<sup>th</sup> February 2015. The Plaintiff pleaded with the defendant to suspend the Statutory Notice to enable the parties enter into negotiation. Since those negotiations never took place it is the finding of this court that the Statutory Notice dated 20<sup>th</sup> February 2015 is legal and effective for all its purposes, and upon the expiration thereof the Defendant should proceed to realise its security subject to conducting a fresh valuation of the suit property.

18. From the foregoing, it is clear that the Plaintiff has failed to establish a prima facie case capable of succeeding, leave alone proving that damages would not be adequate compensation should the suit property be sold. Therefore, the principles established in **Giella – V – Cassman Brown** case have not been satisfied by the Plaintiff/Applicant.

19. In the upshot, the application by the Plaintiff/Applicant herein dated 4<sup>th</sup> June 2015 is dismissed with cost to the Defendant/Respondent.

**READ, DELIVERED AND DATED, AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2016.**

**E. K. O. OGOLA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Mr. Gachie for Plaintiff

Mr. Maishya for Defendant

Teresia – Court Clerk