



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCC. NO. 645 OF 2015

JAMES MUNGAI GACUCU.....1ST PLAINTIFF/APPLICANT

REMMA ENTERPRISES LIMITED.....2ND PLAINTIFF/APPLICANT

VERSUS

STANDARD CHARTERED BANK KENYA.....DEFENDANT/RESPONDENT

RULING

1. The application coming for ruling is dated 17.12.2015 seeking the following orders;

1. *Spent*
2. *Spent*
3. **THAT** the Respondent be and is hereby restrained whether by itself, its servants, agents, officers or any other person whomsoever from in any way disposing off, auctioning, repossessing, selling or otherwise proceeding with the intended sale or interfering with the 1st Applicant's ownership and possession of the suit property being L.R. No 209/11095/57(I.R.No.79385), 209,11095/58 (I.R No.79386) and 209/11095/59 (I.R NO.79387) Rangers Court, South "C" Estate, Nairobi (hereinafter "the suit property") pending the hearing and determination of this suit.
4. **THAT** an order directing the Defendant to render true statement of accounts in respect of the 2nd Plaintiff's account no. 0102027418700 and 10100531353977.
5. **THAT** such other or further orders as the court may deem fit to grant.
6. **THAT** the cost of this application be in the cause.

2. The Notice of Motion is based on the grounds that the Plaintiff is the registered owner of the suit properties which he charged with Defendant for purposes of securing credit facility amounting to Kshs. 33 million. The Applicant has been paying loan however on 22.9.2016 the Respondent issued statutory notice demanding payment in arrears and secured by the charge of the Applicant's above suit properties.

3. The Applicant avers that the issuance is unlawful, unjustified and unmerited. The Applicant avers that the loan was to be paid by one off payment but was converted to a term facility payable in instalments. The Applicant has paid Kshs.6 million by the time of filing instant suit and he has been remitting all the amounts as instalments fell due.

4. However the Applicant avers that even if the 2nd Applicant is in arrears neither is it in amount demanded by the 1st Respondent nor is same over due. The arrears in payment by the Applicants are a state of affairs attributable to the Respondent's breach of contract.
5. Despite understanding between 2nd Applicant and the Respondent that bills of exchange by the bank to facilitate transaction between the Applicant and its clients the Respondent in breach of the parties understanding failed to do so plunging the 2nd Applicant into financial problems.
6. The Applicant also complain that the Respondent presented 2nd Applicant financial/credit position to credit reference bureau (CRB) thus denting the 2nd Applicants credit worthiness and ability to secure funding for its business transactions. The supporting affidavit by Boniface Mechuku sworn on 17.12.2015 reiterates the aforesaid grounds.
7. The same is opposed by the Defendant/Respondent affidavit sworn on 1.2.2016. The opposition is premised on the facts that the facilities granted to the 2nd Applicant were in form of opening a credit line to the 2nd Applicant for Ksh.33 million for a period of 60 days which constituted letters of credit of Kshs.25 million and overdraft of Ksh.8 million.
8. On 15.4.2013 the Respondent granted a supplemental credit facility to the 2nd Applicant extending the maximum period to 120 days. Same was signed by the 1st Applicant in favour of the 2nd Respondent over the suit property. By a letter dated 10.2.2015 the Applicant proposed to pay outstanding balance amounting to about Kshs.31 million by paying Kshs.11 million within 6 months and remaining balance within 6 months and further proposed that Kshs.20 million (remaining balance) be converted to term loan in respect of which the 2nd Applicant would pay approximately Ksh.300,000 per month until the amount is paid in full.
9. The Respondent counter offered that by proposing payment of Kshs.21 million within 14 days and gave written proposal on how it will clear the balance. The applicant no. 2 failed to accede to the proposal and thus by 20.3.2015 was in arrears as follows;
 - a. Ksh, 31,132 259/10 accruing interest @ 19% p.a Account Number 0102027418700 and
 - b. Ksh.2,019,699/37 accruing interest @ 19% Account number 10100531353977.
10. The demand notice was issued and the 2nd Applicant engaged the Respondent in an attempt to reach a settlement. On 28.4.2015, the 2nd Applicant through the 1st Applicant wrote letter to the effect that they had began regularising their accounts and that 2nd Applicant had already deposited Ksh.1,907,830 to A/CNo.0102027418700 which was in arrears to the tune of Ksh.31,132,259/10 as at 20.3.2015. The 2nd Applicant also undertook to clear the outstanding amount in 6 months by depositing Kshs.1 million on monthly basis.
11. The Respondent via its advocate accepted the proposal by the 2nd Respondent's advocate subject to the 2nd Applicant paying legal fees of Ksh.87000/- to the Respondent's advocate on record and Ksh.146,000 to the Respondent's valuers.
12. The Applicants neither paid the legal fees nor valuers fees which were conditional precedent of proposal being accepted; the Applicant sought to pay Ksh.50,000/= all inclusive for and advocate and valuers fees.
13. On 13.4.2015 and 27.4.2015 the 2nd Applicant deposited Ksh.2,477,828 into A/C No.0102027418700 but reneged on payment of Kshs.1 million monthly instalment. In May 2015 the applicant paid Kshs.519,112 and 539980/- in July 2015.
14. On 22.9.2015 due to the 2nd Applicant failure to regularise its A/C No.0102027418700 and

No.10100571353977 statutory notice was issued prompting the filing of this suit.

15. On submissions the Applicant submits that there is a real dispute for determination by court between parties herein. This is because the Respondent refused to discount bills of exchange to enable 2nd Applicant finance its supply to Jumbo Commodities and further listed Applicant for default with (CRB) in the sum of Kshs.56,700 268/90 and as a result, Habib Bank was unable to discount the bill of exchange as earlier agreed. Thus the Applicant no.2 is unable to settle the term facility with respondent.

16. Relying on the case of **MRAO VS. 1ST AMERICAN BANK OF KENYA & 2 OTHER (2003)KLR**, the Applicant submits that they have established a prima facie case as therein defined.

17. On the limb on irreparable damages, the Applicant submit that if Orders are not granted, the suit or charged properties will be sold and thus loss of investment. They rely on the cases of **LOLDIAGA HILLS LTD VS. JAMES WELLS & 3 OTHERS, WAITHAKA VS. ICDC (2001)KLR 374**.

18. On the limb on balance of conveniences, the Applicant submits that they will be very prejudiced by loss of suit properties via sale. They argue that the Respondent will not be prejudiced by the sought orders.

19. On issue of account taking, they are the authorities on principles obtaining in grant of mandatory injunction. HALSURY'S law of England vol. 24 paragraph 948. Africa Safari Club Vs. Commissioner of Police & 6 other (2013)eKLR where the court held that 'mandatory injunctions can only be issued in clear case'. The applicant prays for orders.

20. The Respondent rejoinder is that the Applicants have not established a prima facie case with probability of success and in any case the bank can compensate in damages in event the Applicant win the case.

21. On prima facie case principle, the Defendant/Respondent submits that as defined by MRAO case Supra, the Plaintiff have not established the same in that, they do not challenge issuance of statutory notice nor service of the same or its validity. The principle complaint is that the Respondent failed to honour undertaking to discount the 2nd Applicant's bills of exchange.

22. The Defendant submits that there was no undertaking as alleged and alleged bills of exchange could not be discounted as there were no necessary approvals. The so called undertaking does not satisfy the thresh hold of definition in Black Law Dictionary. It was only a request. In relying on the authority of **GITHUNGURI VS. JIMBA CREDIT CORP. LTD (1988) KLR 825**, the Defendant submits that the 1st limb of grant of injunctions (ie prima facie element) the respond need not delve into other 2 limbs of grant of injunctions. See also **KENNETH NJAGI NJIRU VS. HOUSING FINACNE CO. LTD (HFCK) (2005) eKLR**.

23. On the limb of likelihood of Plaintiffs sustaining irreparable damages, the Defendant submit that, the same properties were offered as securities with understanding that in default of payment of loan, same will be utilised to pay the debt. The same can be valued to determine value such that if Plaintiffs are successfully, they can be compensated.

24. Defendant relies in the case of **CHARLES MUTISYA NYAMAI VS. HFCK(2007)Eklr. Also THOMAS NYAKAMBA OKONGO VS. COOP BANK (K) LTD (2012)eKLR**.

25. On the limb of balance of convenience, the Defendant submits that the bank will be more inconvenienced as it will not get the lent money and that failure is one of elements that may lead to collapse of the banking systems and the economy and thus loss to the whole country. See **JOHN NDUATI KARIUKI T/A JOHESTER MERCHANTS BS. NBK (K) LTD C.A 306/05 (2006)EA 96**.

26. On mandatory injunctions, the defendant submits that the same is spent as the Applicants have

attached statements of account in the supporting affidavit showing 2 Applicants No.2 accounts state of affairs. In any event no special circumstances of orders have been demonstrated in terms of the holding of **KBL Ltd & Another Vs. WASHINGTON OKEYO (2002)eKLR**. See also **LOCABAIL INTERNATIONAL FINANCE LTD VS. AGROEXPORT & OTHERS (1986) IALLER 901**.

27. In any event the Applicants have not approached court with clean hands. In both supporting and supplementary affidavits, the Applicants have not made material disclosure but are out rightly misrepresenting the facts. The out rightly mislead court by claiming to have paid Kshs.6 million and continue to pay outstanding balance; however the statement of account tendered above otherwise they claim not to have defaulted yet they do not support such an averment.

28. Material non disclosure would disentitle the Applicant equitable relief of injunction. See **ANDREW OUKO VS. KCB & 3 OTHERS (2005)eKLR**. Also see **KING VS. THE GENERAL COMMISSIONERS** for the purpose s of the Income TAX ACTS for District of **KENSINGTON (1917) IKB 486**. **NJIRU VS. HFCK supra, ABDULLAH MOHAMED ALI VS. ABDULLAHI SHARIFF & 2 OTHERS (2014) eKLR**.

29. The Respondent thus prays for dismissal of the Application with costs. After going through the Pleadings, Affidavits and the submissions, I find the following issues arising;

1. **Whether the Applicant has established or satisfied the principles for grant of injunctions?**
2. **Whether the Applicants are guilty of material non-disclosure?**
3. **What is the order as to costs?**

30. Whether the Applicants have satisfied the elements of grant of interim injunctions? The **GIELLA** case Supra sets the 3 elements which ought to be satisfied for grant of interim injunctions namely; The Applicant must establish prima facie case with probability of success. The facts herein seem to be diametrically disagreeing as presented by opposite side. Whereas the Applicants avers that they have paid loan up to 6 million and they continue paying the instalments as they fall due, the Respondent has graphically demonstrated how the Applicants have fallen in arrears and thus default.

31. The Applicants hence refused to allude to and or disclose the contents of the letter of 28.4.2015 when they attempted to regularise the account and the fact that they undertook to clear the outstanding amount in 6 months by depositing Ksh. 1 million on a monthly basis. The letter of 15.6.2015 sought to pay Defendant's valuers and advocate Kshs.50,000/= in full and final settlement.

32. The Applicant claims that there was on undertaking made by the Defendant to discount the bills of exchange to enable it pay its debts. The so called undertaking via an email does not amount to any nature and form of an undertaking. See **BLACK Law Dictionary**. It is neither a promise, a pledge or engagement. The above material non-disclosure and the facts that prior to the issuance of statutory notice there was no complaints by Applicant over their accounts operations in the Defendant's bank point to one thing, that no Applicant's right have been violated in terms of **MRAO Supra** case to found a prima facie case. In **OUKO Case Supra**, the Court held that '*...non-disclosure would have disentitled the Plaintiff to the equitable relief of injunction*'. The court finds that the Applicants have not established a prima facie case with probability of success.

33. On the likely hood of Applicants suffering irreparable loss on damages if orders are granted, the same can be answered by the case of **OKONGO supra** where the court held 'once a property is given as security it becomes a commodity for sale and there is no commodity for sale which value cannot be attached. Otherwise institutions would be reluctant to extend financial accommodation to genuine borrowers...'. In **NYAMAI case Supra** the court held that; "*...the suit properties is usually value at the time of leading and time of sale so that the loss of property by sale is clearly contemplated by the parties even before security is formalised, damages is therefore an adequate remedy*".

34. On balance of convenience, the same favours the Respondent. The customers' money is held by the Applicants who are defaulting repayment. The non-performing loans have led to collapse of banks with

severe consequences to the customers' finances and the country income and inconveniences thereof.

35. On the sought orders of mandatory injunctions the court notes that the Applicants have annexed the statements of account which show the state of affairs of their accounts with the Defendant. Further the same account was never demanded prior to the issuance of the statutory notice. The same appears to be an afterthought. The Applicants will be at liberty to seek the same at the trial.

36. The court therefore finds that the Plaintiffs application has no merit. However the court noted that the bank was ready to indulge the Applicant and had given them an option of payment of Kshs.11 million within 14 days and the balance by within a period of 6 months.

37. The court to that extent will grant temporary injunction on condition that;

1. The Plaintiffs to pay Kshs.10 million within 30 days.
2. The balance to be paid within the next 12 months by equal monthly instalments every month and in default of any the injunction lapses.
3. The legal and valuers charges be paid to be agreed or assessed within 30 days.

38. Those are the orders of the court.

Dated, signed and delivered in court at Nairobi this 22nd day of April, 2016.

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C. KARIUKI

JUDGE