



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 892 OF 2010
IQBAL TRANSPORTERS LIMITED.....PLAINTIFF
VERSUS
BANK OF BARODA (KENYA) LIMITED.....DEFENDANT
RULING

INTRODUCTION

1. The Application before the Court is the Plaintiff's Notice of Motion dated **17th December 2010** and filed on even date. It is expressed to be brought under the provisions of Order 40 Rules 1,2,3 and 9 ,Order 41 ,Order 3 rule 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010 as well as Sections 3A and 63 of the Civil Procedure Act. It was also brought under Section 46 of the Registration of Titles Act, Sections 52 and 59 of the Indian Transfer of Property Act 1882 of India as amended by the Indian Transfer of Property Act (Amendment) Act 1959 (the foregoing acts have now been repealed) as well as Sections 103 and 351 of the Companies Act.

2. The Application sought for the following orders;-

1. Spent

2. That pending the hearing and determination of this application, the Defendants be restrained whether by themselves, their agents or servants or otherwise howsoever from appointing, acting and/or purporting to act or continuing to act as Receivers and/or Managers of the Plaintiff and from interfering in any manner with the Plaintiff's quiet possession and enjoyment of all its land, bank accounts, properties, machinery, equipment and assets.

3. That pending the hearing and determination of this application, the Defendants be restrained by themselves, their agents or servants or otherwise howsoever from selling, disposing of, offering for sale or alienating in any manner whatsoever the Plaintiff's land, to wit Maisonette No.6 on L.R. No.1870/VII/52 Westlands .

4. That prayers (2) and (3) be granted pending hearing and determination of this suit.

5. That due to the urgency involved, compliance with provisions of order 3 rule 2(b) (c) and (d) be dispensed with in the first instance.

6. That the Defendant be ordered and compelled to forthwith render to the Plaintiff/Applicant a proper and full account of the Plaintiff's account maintained with the Defendant.

7. That an order be made under Section 52 of the Transfer of Property Act, 1882 of India (amended) that during the pendency of this suit ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in ALL THAT parcel of land or property known as Maisonette No.6 on L.R. No.1870/VII/52 Westlands with any Land Registry, Government Department, and all other registering authorities BE AND IS HEREBY prohibited.

8. That the Plaintiff be at liberty to apply for such further or other orders and /or direction as this Honourable

Court may deem fit and just to grant.

9. That costs of this application be borne by the Defendant.

THE PLAINTIFF'S CASE

3. The application is based on the grounds set out therein and is supported by the Affidavit of **Javaid Iqbal Khan**, a Director of the Plaintiff, and was sworn on **17th December 2010**. The said Director also swore a Further affidavit on 19th January 2011 as well as a 2nd Further Affidavit on 2nd October 2014 in support of the application. The Plaintiff's submissions dated 2nd October 2014 were filed on even date.

4. The background to the Plaintiff's application is that at all material times there existed a banker customer relationship between the Plaintiff and the Defendant. The Plaintiff held a current account and a loan account with the Defendant. The Parties herein entered into a financial agreement vide the Letter of Offer dated **17th November 2007**. The Defendant granted the Plaintiff an Overdraft facility of Kshs. 12,000,000/= and a Loan of Kshs. 22,000,000/=. The foregoing facilities were secured by a Legal charge over Maisonette No.6 on L.R 1870/VI/52 Westlands (herein the Suit Property) to cover Kshs. 12 m, Fixed debentures and chattels mortgage charge on trucks and vehicles provided by the company and its directors, Joint and several guarantees to be executed by all directors of the company for Kshs.12 Million, individual guarantee for Kshs.12 Million by Mr. Javaid Iqbal as owner of the property being charged among other securities. The Plaintiff approached the Defendant for a further overdraft facility which was granted vide the Defendant's letter of offer dated **31st May 2008**. The same was secured by more or less the same securities for the initial facilities. It is the Plaintiff's assertion that the borrowing and execution of documents required by the Defendant Bank were to be supported by an appropriate board resolution.

5. The Plaintiff avers that the Defendant subsequently issued them with a Statutory Notice dated **23rd September 2010** demanding them to pay a sum of **Kshs.51, 433, 616.74** within three months from the date of service of the notice failure to which the Defendant would sell the charged property by public auction or private treaty.

6. It is the Plaintiff's case that the Defendant's statutory power of sale has not arisen. According to the Plaintiff the borrowing herein was unlawful in that it was not sanctioned by its Board of Directors and that there was no resolution to secure the borrowing by a director's properties nor was the Plaintiff's seal affixed on the instrument(s) involved in the borrowing in accordance with the provisions of its Articles of Association. The Plaintiff further contended that the purported charge in favour of the Defendant was null and void in law for want of compliance with the mandatory provisions of the Indian Transfer of Property Act (1882) as applied under the Laws of Kenya and the Law of Contract Act. Among the Particulars for want of compliance were that, the charge was defective for want of proper attestation and that the Certificate contemplated by Section 69 (1)A of the I.T.P.A. was incomplete and therefore no statutory power of sale could arise in the circumstances. Further, the Provisions of the said Section 69 (1) of the I.T.P.A. were not explained to the Plaintiff by an Advocate as strictly required under the said law. It is also the Plaintiff's contention that the suit property does not belong to it but to one of its Directors, Mr. Javaid Iqbal.

7. It is further the Plaintiff's case that the purported guarantee dated 7th March 2009 is illegal and unenforceable in law since it purports to guarantee repayment of an unspecified amount of money and interest. The Plaintiff's contention is that the guarantor's liability though said to be limited covers unspecified interest, commissions, charges, costs and expenses which were secured by other facilities. It is also their position that the debenture herein was null and void and of no legal effect on the grounds, inter alia, that it was created without a resolution of the Board of Directors of the Plaintiff authorizing the issuance of the Debenture and affixing of the common seal thereto. The Plaintiff is apprehensive that the Defendant is likely to purport to place its business under receivership relying on the impugned debenture created over the assets of the company and one of its directors.

8. With regard to the interest rates levied on the facilities, it is the Plaintiff's case that Section 44 of the Banking Act forbade the increase by the Defendant of its rate of banking or other charges except with the prior approval of the Minister for Finance. The Plaintiff argues that the Defendant in blatant disregard of the provisions of the aforesaid law reserved the right to increase the rate of banking in its sole discretion and without informing them. It is also their contention that the Defendant levied oppressive and usurious interests, charges, and penalties on the loan account which sums have no basis either under the contract or otherwise. Further, the Plaintiff contends that, in complete disregard to the provisions of section 44 A of the Banking Act which introduces the concept of a non-performing loan and limits the amount to be claimed in respect of a non-performing loan, the Defendant has failed to determine the date the Plaintiff's loan became non performing and to inform the Plaintiff of the said determination. It is therefore the Plaintiff's case that the purported principal amount and the interest accruing thereon and the subsequent intended exercise of the statutory power of sale are premature. It is the Plaintiff's position that the foregoing actions by the Defendant has had the effect of putting them in perpetual indebtedness and amounts to a clog and fetter on their equity of redemption.

9. It is also the Plaintiff's case that it was a condition precedent in the banking relationship between it and the Defendant that the Plaintiff would keep the Defendant apprised on its contract with the U.N world food programme and as long as the contract subsisted, the Defendant would not take any action under the powers purportedly derived from the security documents which was likely to negatively impact on the Plaintiff's business. However, as is averred by the Plaintiff, the Defendant in utter breach and disregard of the foregoing purported to issue a statutory demand dated 23rd September 2010 requiring the Plaintiff to pay a sum of **Kshs.51, 433,616.74** within three months from the date of service of the notice failure to which the Defendant would sell the charged property by public auction or private treaty.

10. In light of the above, the Plaintiff urged the Court to grant the orders as sought in its application pending the hearing and determination of this suit.

THE DEFENDANT'S CASE

11. In opposition to the application, the Defendant filed the Grounds of Opposition dated **14th July, 2014**; the Replying Affidavit of DIWAKAR PRASAD SINGH sworn on **15th July, 2014**, both filed on **15th July, 2014** and the Further Replying Affidavit of DILEEP SINGH ARYA sworn on **22nd October, 2014** and filed on **23rd October, 2014**. The Defendant's submissions dated 13th November 2014 was filed on even date.

12. The Defendant averred that the letter of offer dated 17th November, 2007 was endorsed and sealed by the Plaintiff in acceptance of the terms and conditions set out in the letter pursuant to a resolution of the directors of the plaintiff of 28th November, 2007. See pages 3 and 4 of the exhibit attached to the Defendant's Replying Affidavit. In addition, on 27th March, 2008 the directors of the Plaintiff passed a further resolution accepting the letter of offer from the Defendant of 17th November, 2007 and agreeing to provide the securities required therein. See Page 21 of the Exhibit.

13. It is further averred by the Defendant that the Plaintiff executed various securities on its behalf including a Fixed Debenture dated 5th March 2008 in respect of 12 motor vehicles to secure a sum of Kshs. 30,300,000/= and a Charge dated 5th March 2008 executed by Javaid Iqbal over the maisonette LR No. 1870/VI/52 to secure a sum of Kshs. 12,000,000/=.

14. Further, on 24th February, 2009 the Plaintiff executed under Seal a request for banking facilities up to a limit of Shs 52,000,000.00 [page 82 of the exhibit hereto]. Pursuant to that request Javaid Iqbal Khan and Nipti Shah on 7th March, 2009 executed a further joint and several guarantee for Kshs. 52,000,000.00. [Pages 83 to 89 of the exhibit hereto]. On 17th July, 2009 the Defendant wrote to the Plaintiff [pages 90 to 101 of the exhibit hereto] offering revised facilities of an overdraft facility of Kshs. 30,000,000/= and a loan facility of Kshs. 22,000,000/= on the terms set out in the letter.

15. It was the Defendant's case that since they were not receiving payments from the Plaintiff, they instructed their advocates then, Mwaura & Wachira who wrote to the Plaintiff on 8th July, 2010. In reply, the Plaintiff on 19th August, 2010 acknowledged that the amount demanded was "long overdue". By a letter dated 22nd December, 2010, after the Plaintiff had filed this suit, they informed the Defendant of the steps they were taking to repay the monies due from the sale of a property in Ruaraka and by collections from World Food Programme and other debtors.

16. Thereafter, on 23rd August, 2012 Hamilton Harrison & Mathews, the Defendant's Advocates on record, issued letters of demand to Javaid Iqbal Khan and Nipti Shah as guarantors of the indebtedness of the Plaintiff [pages 109 to 114 of the exhibit hereto]. Subsequently, the Defendant's Advocates issued the statutory notice under section 56 of the Land Registration Act, 2012 to Javaid Iqbal Khan under the Charge over LR 1870/VI/52. The letter stated that the Defendant was aware of the interlocutory orders in this case and that no action would be taken to sell the charged property while the orders remained in force. This was followed by an exchange of letters from 28th November, 2012 to 29th January, 2013 between the advocates for the parties herein relating to the possible sale of the suit property and the amount secured under the Charge and the guarantees.

17. As no agreement was reached, the Defendant's Advocate on 27th January, 2014 issued the statutory notice under section 90 of the Land Act. The letter again stated that the Defendant was aware of the interlocutory orders in this case and that no action would be taken to sell the charged property while the orders remained in force.

18. The Defendant produced some statement of Accounts in relation to the Plaintiff's loan and Overdraft accounts held with the Defendant. The deponent confirmed that the said statements were true and correct; and that the original entries were in the ordinary books of the defendant; and that the original entries were made in the usual and ordinary course of business; and that the same are in the custody and control of the Defendant.

19. On the issue of interest as per Section 44A of the Banking Act, it was the Defendant's assertion that the accounts of the Plaintiff became non-performing on 31st July, 2010. On the said date, the amounts due from the Plaintiff to the Defendant were Kshs. 31,011,631.74 on the overdraft account and Kshs. 20,421,985.00 on the loan account. It was the Defendant's position that under the provisions of section 44A of the Banking Act they were entitled to recover double those amounts.

20. It is the Defendant's case that the Plaintiff is properly indebted to them. It is further their case that they are entitled to enforce the securities they hold from the Plaintiff and from the guarantors, Javaid Iqbal Khan and Nipti Shah, and the Charge over the maisonette on LR 1870/VI/52. The Defendant avers that proper statutory notices have now been given by their Advocates and they pray that they be allowed to realise the securities and take action to recover the debts due from the plaintiff and the guarantors.

ANALYSIS

21. I have considered the application, the affidavits in support and opposition to the application as well as the written submissions by Counsel. Having done so, I take the following view of the matter.

22. The Plaintiff's main case is that the Defendant's Statutory Power of Sale has not arisen. In arguing the same, the Plaintiff has raised various issues in support of its injunction application and the other orders as sought for in its application. In determining whether or not the Plaintiff is entitled to the injunctive orders sought, this Court will establish whether the Plaintiff has met the requirements for grant of an injunction as laid down in the case of **Giella vs Cassman Brown & Co. Ltd [1973] 358 E.A.** The requirements are that first the Applicant must show a *prima facie* case with a probability of success at the trial.

Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience.

23. The Plaintiff does not seem to dispute the fact that it requested from the Defendant the various facilities as mentioned in the pleadings. However, what is in dispute is the validity of the purported securities that were meant to secure the said facilities.

24. The Plaintiff submitted that, the Defendant purported to charge the property known as Maisonette No.6 on L.R 1870/VI/52 Westlands (the suit property) as security for the said loan vide the charge dated 5th March 2008 without a resolution duly passed by the Plaintiff's board of directors. The said loan was also purportedly secured by personal guarantees executed by two of the Plaintiff's directors namely Javaid Iqbal and Nipti Shah. It was therefore the Plaintiff's submission that the purported charge was null and void for want of legality and form.

25. In essence the Plaintiff does not dispute the existence of the various securities executed on behalf of the Defendant. The Plaintiff's contention is that there was no resolution from its Board of Directors to execute some of the securities like the guarantees and the Debenture and that some securities like the Charge document were not properly attested to as they lacked the Company Seal. It is notable that the Charge dated 5th March 2008 executed by Javaid Khan over the suit property does not have a seal. However, the same was executed by Mr. Khan in his individual capacity and therefore did not need a Company seal for its validity. It was also the Plaintiff's case that the Charge was executed by a Company Secretary who was not qualified thereby making the charge unenforceable in law. This Court has already established that the Charge was executed by Mr. Khan as the owner of the property and the attestation by the Company secretary was not necessary. Other than the issue of the Company Seal, the Charge document was properly attested to and there is nothing to render it fatally defective.

26. It was also the Plaintiff's case that the Certificate contemplated by Section 69 (1) A of the I.T.P.A. was incomplete and that the Provisions of the said Section were not explained to the Plaintiff by an Advocate as strictly required under the said law. In this case the provisions of section 69 of the I.T.P.A were to be explained to Mr. Khan who executed the Charge. However he did not produce any evidence that the same was not explained to him. The Defendant averred that the explanation was given to Mr. Khan and they produced the said Certificates. (See the Certificate on pages 76 and 77 of the exhibit attached to the Defendant's Replying Affidavit) Mr. Khan appended his signature to the said Certificate in affirmation that the provisions of section 69 (1) had been read and explained to him.

27. On the issue of resolution(s), there is a Resolution dated 27th March 2008 by the Plaintiff on the Court record as attached to the Defendant's Replying Affidavit. (See page 21 of the Exhibit) In the said resolution, the Directors of the Plaintiff accepted the letter of offer from the Defendant on 17th November 2007 and agreed to provide the securities required by the Defendant. The Plaintiff cannot therefore be heard to say that there was no authority to execute the guarantees and the Charge executed on its behalf. There is also a resolution by the Plaintiff dated 28th November 2007 in which the Plaintiff through its directors authorises the execution of the legal charge and the personal guarantees by the directors as securities for the facilities offered by the Bank. (See pages 3 & 4 of the Exhibit to the Defendant's Replying Affidavit)

28. The above notwithstanding, the Plaintiff had never raised an issue with the Charge document or the guarantees by the directors until this suit was filed. It does not deny that the facilities that are now outstanding were issued to it. In fact there are correspondences on the Court record in which the Plaintiff has admitted to being indebted to the Defendant. (See pages 104-108; 121, 126 and 132 of the exhibit to the Defendant's Replying Affidavit) This is proof enough that the Plaintiff was granted financial facilities by the Defendant which it has not repaid in full. As a result of the Plaintiff's indebtedness it only means that the Defendant has a right to exercise its statutory power of sale if the outstanding amount is not settled in full.

29. With regard to the issue of interest rates, it was the Plaintiff's submission that the interest clause in the Charge document was illegal as it provided for variation of the rate of interest at the instance of the Defendant hence defective in substance. According to the Defendant, the Prevailing law at the time of advancing the loan which was in the year 2007 provided for fixed interest rates over a fixed repayment period. The applicable law was section 44 of the Banking Act which provides thus:-

“No institution shall increase its rate of banking or other charges except with the prior approval of the minister”

To this end the Plaintiff relied on the case of **Givan Okallo Ingari & Another –vs- HFCK, In (Milimani) HCCC No. 79 of 2007** where the Plaintiff sought an injunction against the threatened sale of their property by the Defendant on the ground that the Defendant had imposed illegal and uncontractual penalty and interest. In that case the Court established that the Defendant had deviated from the contractual document in levying interest rates and penalties. On that basis the Court preserved the suit property by granting an injunction.

30. In the current application the issue of interest is to be found at clause 3 of the Charge Document. The Defendant Bank herein at clause 3.14 reserved the right to determine the rates from time to time and to charge different rates. There is nothing to show that the Defendant deviated from what had been agreed upon in the charge document. Therefore the cases referred to by the Plaintiff are distinguishable. In the said cases, the Bank was in breach of the agreement between the parties therein. In this case, the Plaintiff agreed to such terms as to interest rates by appending its signature on the Charge document. There are no details of what change in the rate of interest is contrary to the letter of offer. In that case this Court is only called upon to enforce the contract as agreed upon by the Parties and not to vary the same.

31. Moreover, and particularly in reference to section 44 of the Banking Act which the Plaintiff seeks to rely on to invalidate the interest clause, the Court's position has been that the said section 44 of the Banking Act is uncertain. The provisions of the said section state that **“No institution shall increase its rate of banking or other charges except**

with the prior approval of the minister”.

There is obviously no mention of “interests”. I agree with the sentiments of Justice Ochieng’ in the case of **Daniel Kamau Mugambi vs Housing Finance Company of Kenya Ltd [2006] eKLR**. In the said case, the honourable Judge after citing the case of **Desai & Others v Fina Bank Ltd [2004] 2 EA 46 at 51**, where **Hon. Emukule J.** concluded that Section 44 of the Banking Act did not appear to touch on interest rates, stated as follows:-

“... the question as to whether or not the provisions of Section 44 of the Banking Act limit the interest rates chargeable by banks and other institutions appears to be uncertain.”

In any case, Section 52 of the said Banking Act is express to the extent that no contravention of the provisions of the Act shall affect or invalidate in any way any contractual obligation between an institution and any other person. Therefore in the absence of any fraud or illegality, this Court finds that the clause on interest in the Charge document was valid.

32. The Plaintiff has also argued that the Defendant contravened the provisions of section 44A by failing to determine when the loan became non-performing and to inform them of such determination. The Defendant in its pleading and submission has stated that the loan became non-performing on 31st July 2010. In that case they have fulfilled the requirement of determining when the loan became non-performing. The provisions of Section 44A are clear and there is no express requirement on the part of the Bank to inform the Debtor, in this case the Plaintiff, upon its determination that a loan has become non-performing. The purpose of the said section is to set a cap on what amounts can be recovered.

33. In view of the foregoing, it is evident that the Plaintiff has failed to establish a *prima facie* case. Subsequently the Plaintiff has failed to establish any irreparable loss it may suffer if the injunction orders herein are not granted. In executing the securities in favour of the Defendant, the Plaintiff was well aware that if they defaulted in repaying the facilities, the Defendant was entitled to exercise its right of the sale of the securities.

34. On the requirement for balance of convenience, the same would tilt in favour of the Defendant as it is not in dispute that the Plaintiff was granted financial facilities by the Defendant and the Court has now established that the said facilities have not been repaid in full. The same are outstanding and continue to accrue interest.

35. As regards the issue of the Statutory Notice(s), it is settled that the Statutory Notice issued on 23rd September 2010 was struck out by this Court. The subsequent Statutory Notices as issued by the Defendant were done while the interlocutory orders issued by this Court were subsisting. However, in the said Notices the Defendant had indicated that they were aware of the interlocutory orders of this Court and no sale would take place while the Orders subsisted. I therefore do not find that the Defendant disobeyed any Court Orders.

36. There were other prayers which were not necessarily injunctive in nature. Prayer 5 was seeking for orders that due to the urgency involved in the matter compliance with provisions of order 3 rule 2(b) (c) and (d) be dispensed with in the first instance. I believe this order was only applicable at the immediate time of filing the suit and the instant application. It has now been 4 years since the pleadings were filed and there would be no reason to dispense with the compliance of the said Order which requires the Plaintiff to file statements of witnesses or bundle of documents.

37. There is also Prayer 6 in which the Plaintiff prays that the Defendant be ordered and compelled to render to them a proper and full account of the Plaintiff’s account maintained with the Defendant. To this end the Defendant produced the statement of accounts which are fully set out at pages 137 to 168 of the Defendant’s Replying Affidavit. The Plaintiff has not challenged the veracity of the same other than disputing the amounts therein. This Order has therefore been complied with.

38. In conclusion, it is worthy to note that the grant of an injunction is an equitable remedy. In that case the conduct of the Plaintiff in this matter ought to be considered. The current application was filed on 22nd December 2010. It has been shown that a few days after filing the said application, the Plaintiff indicated to the Defendant the prospects of repaying the outstanding loan through the sale of one of its properties and recovering debts. This means that even as the Plaintiff was filing the current suit and application they were well aware that they were indebted to the Defendant. In addition, since the suit was filed there is no evidence that the Plaintiff has made efforts to settle the amounts due. Furthermore, the Plaintiff did not give any substantive reasons as to why it took over four years to prosecute the current application. In light of the Plaintiff’s conduct, it is clear that they are not entitled to equity by way of injunction. He who seeks equity must do equity.

DISPOSITION

39. In the circumstances foregoing, the upshot of this court’s ruling is that the Plaintiff’s Notice of Motion dated 17th December 2010 and filed on 20th December 2010 is not merited and is therefore dismissed with costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JUNE 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Nganga holding brief for King'ara for the Plaintiff

Mr. Fraser for the Defendant

Teresia – Court Clerk