REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

HCCC. NO. 215 of 2015

OLIVE FARM LIMITED.....PLAINITFF/APPLICANT

VERSUS

FAMILY BANK LIMITED….....DEFENDANT/RESPONDENT

RULING

Pleadings

1. The Plaintiff moved this court by way of a Notice of Motion dated 4th May, 2015 expressed under the provisions of Order 40 rules1, 2 and 4 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The prayers sought are as follows ;-

a. ***Spent***

b. ***Spent***

c. ***THAT a temporary injunction do issue restraining the Defendants by themselves and/or through their agents and/or servants from levying any interest, penalties or charges in respect of the charge registered on 5th October 2013 against the current account number 0474836993020004 8/047000010073 and loan account number 047serl123250001 belonging to the Plaintiff pending the hearing and final determination of the suit herein.***

d. ***THAT the costs of this Application be in the cause.***

2. The grounds of the application were enumerated on the application and supported by the affidavit of Charles A. Njoroge, the Managing Director of the Plaintiff, sworn on 4th May, 2015. It was deponed that the Plaintiff and the Defendant had a lender - borrower relationship whereby the Defendant advanced an overdraft facility of Kshs. 5,000,000/= at an interest rate of 18.5% per annum vide a letter of offer dated 24th September, 2009.

3. The said facility was secured by a registered charge on the land known as LR. No. Dagoretti/Riruta S. 448. It was the contention of the Plaintiff that the Defendant bank was charging interest contrary to the agreed rate as per the letter of offer and registered charge, leading to a massed arrears on its part.

4. The Plaintiff further averred that the Defendant had attempted to realize the security it held due to the accrued debt. That consequently, the Plaintiff and the Defendant entered into negotiations culminating

into a letter of offer issued by the Defendant on 9th November, 2012, where the Defendant accepted to convert the overdraft facility to a term loan for a period of five years. The Plaintiff stated that at the time, its debt had built up from Kshs. 5,219,456.26/= on 1st January 2011 to Kshs. 8,750,556.63.

5. It was also the disposition of the Plaintiff that the interest levied on its loan account was manifestly excessive warranting it to meet with the Defendant's senior officers on 6th September, 2013 where the issue of interest was discussed at length. The Plaintiff further claimed that it wrote a letter dated 7th October, 2014 where it again complained on the issue of the interest rate charged on its loan facility. According to the Plaintiff, it was due to these various complaints that the Defendant credited Kshs. 750,000/ - to its account without any formal communication, which was a clear admission on the part of the Defendant that it overcharged interest on the loan account.

6. The Plaintiff additionally contended that the Defendant had failed to respond to its various letters with regard to the levying of interest on the loan account. That subsequently, it sought the services of the Interest Rates Advisory Centre (IRAC) for computation of its actual loan status with the Defendant. Accordingly, IRAC concluded that the interest charged on the Plaintiff's loan amount was irregular and illegal. The Plaintiff contended that in its report, IRAC noted that the outstanding balance as at 31st January, 2015 of Kshs. 5,917,443.47/= was erroneous as the recalculated cleared balance ought to have been Kshs. 514,660.19/= indicating a re-calculation difference of Kshs. 5,402,783.28/=.

7. In light of this report, the Plaintiff averred that it wrote several demand letters to the Defendant urging them to rectify its records in line with IRAC's report. That the Defendant failed to respond to the said letters and continued to debit Kshs. 233,785/= in the Plaintiff's account for the month of February, 2015 and Kshs. 205,763/= in the month of March.

8. From the foregoing, it is the Plaintiff's contention that if the Defendant is not restrained by this court, the Defendant will again debit its account with Kshs. 203,000/=, thereby crippling the Plaintiff financially. The Plaintiff, in sum claimed that it had paid all its outstanding debts with the Defendant and that it was in fact the Defendant bank that owed it a refund on the excess deposits made.

9. In reply to the application, the Defendant filed grounds of opposition dated 21st May, 2015 and the Replying Affidavit of Bernard Kiprotich sworn on 27th March, 2015. It was the contention of the Defendant that the Plaintiff had failed to meet the requirements for the grant of an injunction.

10. The Defendant averred the Plaintiff held a business current account number 047000010073 domiciled at its Limuru Branch. That the Plaintiff applied for an overdraft facility which was approved through the letter of offer dated 19th September 2009. That the said facility was secured by a registered charge for a term of 12 months and the applicable interest was 18.5% per annum. It was contended that the Plaintiff failed to service the facility as agreed in the year 2010 prompting the Defendant to attempt to dispose the charged land, but the same was abandoned. However, the conceded that the auctioneer's fees were debited to the Plaintiff's loan account.

11. The deponent further explained that at the request of the Plaintiff the bank converted the overdraft facility to a term loan citing financial difficulties on its part. The terms of the loan were for the sum of Kshs. 8,751,000/= repayable in installments of Kshs. 254,494.60/=. It was also the contention of the Defendant that the Plaintiff also requested for a waiver of interest from the prevailing 22.5% to a lower interest rate, but the same was declined as the bank could not reverse the charges on the overdraft facility.

12. The Defendant added that the initial overdraft facility was for a sum of Kshs. 5,000,000/= but due to the default on the part of the Plaintiff the interest charged after the expiry of the overdraft was Kshs. 3,953,147.42/=, between 2010 to 2012. That the amount deposited by the plaintiff between the time the overdraft expired to the time the loan was converted was Kshs. 1,350,000/=. The defendant specified that the amount paid to the auctioneers during the attempted recovery of the charged land was as Kshs. 302,046/=. That the balance that was therefore converted to the term loan was Kshs. 8,953,147.42/=. It was therefore the Defendant's position that the failure to make the repayments on the overdraft facility as

required led to the Plaintiff's current predicament.

13. According to the Defendant, the Plaintiff bound itself to the terms of the charge whereby the Defendant reserved the right to change the rate of interest without notice to the Plaintiff subject to the regulations of the Central Bank of Kenya. The Defendant also conceded that the Plaintiff had made several complaints with regard to the interest it had paid, but reiterated that the interest levied was purely as a consequence of default. It was also the Deponent's contention that the allegation that the Plaintiff had made payments to the tune of Kshs. 11, 759,122/= was unsubstantiated since no evidence had been provided to support that claim.

14. The Defendant further contended that the Kshs. 750,000/= deposited in the Plaintiff's account was an ex gratia rebate on interest and was not in any way an admission that the Defendant overcharged interest on the Plaintiff's loan account. The deponent also averred that the Defendant has always been accommodative to the Plaintiff even though it was a persistent defaulter. Accordingly, the Defendant averred that an injunction cannot issue in the foregoing circumstances since the Plaintiff's alleged losses are quantifiable and can be compensated by way of damages.

15. In response to the grounds of opposition and replying affidavit, the Plaintiff filed a further affidavit by Charles A. Njoroge sworn on 3rd June, 2015. In it, the Plaintiff maintained that it serviced the overdraft facility when it was still in force as required. That the Defendant failed to disclose that it took two (2) years for the Defendant to convert the overdraft facility to a term loan. The Plaintiff maintained that it was during this period the Defendant levied punitive interest of over Kshs. 4,000,000/= to the account, yet it had itself occasioned the delay. That further the bank attempted to recover the security it held, but refrained from doing the same when the Plaintiff raised an objection.

16. However, the Plaintiff contended that Kshs. 302,046/= in auctioneers fees debited in its account was unfair and irregular. It was also contended that the Defendant cannot legally change the rate of interest without informing the Plaintiff. The Plaintiff further restated that it did not default in payment of the loan amounts secured in the charge after the overdraft was converted a term loan.

17. It was also the Plaintiff's contention that the Defendant did not deny breaching Section 44(a) of the Banking Act but instead attempted to justify the breach of law. The Plaintiff further maintained that it had paid Kshs. 11, 759,122/= and the expert report by IRAC was proof of that fact. With regard to the Defendant's position that the crediting of Kshs. 750,000/= was an ex gratia rebate on interest, the Plaintiff dismissed the same and contended that it was unusual for the bank to result to such an action when there has been default on the part of the borrower. Concerning the IRAC report, the plaintiff contended that the same is legitimate as it was prepared by a body mandated to recalculate interest. That from the same, the Plaintiff had been overcharged with Kshs. 5,402,783.28/= as at 31st January, 2015, a fact that the Defendant did not deny.

18. The Plaintiff further deponed that Kshs. 233,785 was paid in February, 2015, Kshs. 205,762/= in March 2015, kshs.219,000/= in April 2015and Kshs. 219,000/= in May, 2015 despite the overcharge and that therefore it does not make sense to continually pay a loan that has already been fully repaid. The Plaintiff therefore urged the court to restrain the Defendant Bank from demanding further payments. That in any case the Plaintiff maintains its accounts with the Defendant and therefore no prejudice will be occasioned to the Defendant Bank if an injunction were to be issued pending the hearing of the substantive suit.

Submissions

19. The Application was canvassed through written submissions orally highlighted in court by learned counsel to the respective parties. Learned counsel Mr. Kihara appeared for the Plaintiff, while Learned Counsel Mr. Kariuki appeared for the Defendant.

20. The Plaintiff filed its submissions dated 3rd June, 2015 on 4th June, 2010. The same contained the facts largely contained in the Pleadings. In summary, the Plaintiff argued that the application does not

involve the disposal of property but an injunction against the Defendant from continuing to debit the Plaintiff's account every month. Mr. Kihara submitted that the defendant has charged and continues to charge illegal interest rates, charges and penalties, causing disruptions of the Plaintiff's management operations.

21. The Plaintiff further argued that it was evident that for a loan of Kshs. 5,000,000, the Plaintiff had paid a total of Kshs. 11,759,122/= by way of interest and at the time the principle sum stood at Kshs. 8, 218,316.61/=. That the Respondent Bank still claims that currently, the sum of Kshs. 5,000,000/= was outstanding. That in the foregoing, the defendant's actions are contrary to section 44(a) and 44 of the Banking (amendment) act 2007.

22. Mr. Kihara also pointed out that the crediting of Kshs. 750,000/- in the Plaintiff's account by the Defendant after the Plaintiff had raised issues with the interest rate was a clear admission on the part of the Defendant that it was overcharging interest. That further, the registered charge dated 24th September, 2009 on LR No. Dagorreti/ Riruta s.448 clearly defined the interest rate payable as 18.5% per annum and an additional default charge at the rate of 0.6%.

23. According to the Plaintiff's submissions, the Defendant was currently levying an interest rate of upto 25% which was contrary to the parties' agreement. The Plaintiff relied on the Case of **HCCC Milimani Christopher Ndolo Mutuku& Another –vs- CFC Stanbic Bank Ltd**, to support its submission that the Charge document was always the superior document as opposed to the letter of offer, therefore the Defendant could not charge interest above what was stipulated in the charge. Mr. Kihara went ahead to argue that the IRAC report presented to the court was also proof that Defendant charged interest rates that was over and above what was agreed. That in light of the foregoing facts, it was clear that the Plaintiff had satisfied the requirements for the grant of an injunction pending the hearing and determination of the suit. The Plaintiff therefore urged the Court to grant the prayers sought in the application.

24. Through its submissions dated 28th June, 2015, the Defendant submitted that the Plaintiff had not made out a case fit for the granting of injunctive relief as enunciated by the case of **Giella –vs- Cassman Brown Limited (1973) EA 358**.

25. According to Mr. Kariuki, the Plaintiff has come to this court with unclean hands since it is currently in default to the tune of Kshs. 5,524,425.83/=. That the plaintiff applied for and received an overdraft facility from the Defendant and having taken its benefit, it failed to repay and appealed to the Defendant to give it more time to pay by offering to repay at the interest rate of 24.5% over a period of 3 years. That accordingly, the Plaintiff has now turned around and decided that though it bound itself to repay the loan in those terms, the interest rate it assured itself to repay, is illegal.

26. The Defendant therefore asserted that the Defendant has failed to make out a prima facie case and an injunction ought not to issue. It was also submitted that the Plaintiff has not demonstrated that any irreparable loss shall occur if the injunction is not granted. That in any event the amount the Plaintiff allegedly paid in excess is quantifiable and can be compensated by way of damages, should the Defendant be found to have acted in breach of the agreement between the parties.

27. Mr. Kariuki also argued that the balance of convenience lies in favour of the Defendant's bank since there is substantive evidence that the Plaintiff enjoyed the facility which it failed to repay. That further the interest and charges complained about are not illegal as set forth by the plaintiff, but the same were governed by the terms and conditions of letters of offer and charge document. The Defendant relied on the case of **Mrao Limited –vs- First American Bank of Kenya Limited & 2 Others (2003) KLR 125** in support of its arguments. In sum, the Defendant asked the court to dismiss the Plaintiff's application with costs.

DETERMINATION

28. I have carefully considered the application and the affidavits of the respective parties. I have also considered the various submissions and cited authorities made by Counsel. The principles that guide the

court when considering an application for an injunction are set out in the case of **Giella –v- Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success, that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss, and that if the court is in doubt, it will decide the said application on a balance of convenience. Further, it is of note that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial. With this in mind, I find that the issues that fall for determination are;

a. **Whether the Plaintiff has placed enough material to persuade the court to grant the prayer for injunction sought?**

b. **Has the Plaintiff established a prima facie case with a probability of success? In other words, has it demonstrated that it has a genuine and arguable case?**

29. To answer that, I will address the grounds upon which the Plaintiff is relying as discussed above, and the response thereto from the Defendants. The crux of the matter in this application is that the Defendant has been irregularly levying interest, penalties and other charges against the Plaintiff's loan account.

30. It is not in dispute that the Plaintiff and the Defendant have a bank- customer relationship that led the Plaintiff to request for various loan facilities from the Defendant. According to the Pleadings, the Plaintiff secured an overdraft facility of Kshs. 5,000,000/= for a period of 12 months from the Defendant. The rate of interest on the principle amount was pegged at 18.5% per annum. In case of default, a charge of 0.6% above the rate specified would apply. I am able to deduce these facts from the Loan facility offer letter dated 19th September, 2009 and the Charge document dated 24th September, 2009.

31. However, I am mindful of the fact that the said loan was restructured at the behest of the Plaintiff, whereby the Over draft facility was converted to a term loan for a period of 60 months. The terms were that Kshs. 8,751,000/= was advanced to the Plaintiff which was to be paid in 60 equal monthly installments of Kshs. 254,494.60/= from the first draw down, till repaid in full. The interest charged on this principle amount was 24.5% per annum and incase of default, a further 6% per annum would accrue on the loan arrears amount. The same was secured by a Charge over LR. No. Dagoretti/Riruta s. 448, joint and several Guarantees by the directors of the Plaintiff Company as well as a personal guarantee from the owner of the charged land.

32. It was the Plaintiff claim that notwithstanding the contractual stipulations of the charge, the Defendant has levied varied interest and penalty charges contrary to section 44 of the Banking Act, Cap. 488 of the Laws of Kenya.

33. The Defendant, in response, stated that it never subjected the loan to varying interest rates without notice to the Plaintiff. That the interest applicable was 18.5 % per annum as per the letter of offer dated 19th September, 2009 for the overdraft facility. That the Plaintiff fell into arrears on the same and subsequently requested for the conversion of the overdraft facility to a term loan. That the Defendant acceded to this request whereby a term loan of Kshs. 8,751,000/= was advanced to the Plaintiff and that it later fell into arrears which attracted various default penalties. The Defendant maintained that it had not charged any interest that was outside the contractual terms entered into by the parties.

34. Given these rival arguments of the parties, the question that springs to mind is whether the Plaintiff can request for an interlocutory injunction to restrain the Defendant from levying any interest, penalties or charges in respect of the registered charge.

35. I have to state that the law as established by judicial precedent is that even if a borrower has a dispute with the interest and charges levied by the lender, he should not stop repayments until a court of law makes pronouncement as to the illegality or otherwise of the interest and the charges. Honourable **Justice Ochieng** in the case of **DANIEL KAMAU MUGAMBI v. HOUSING FINACE COMPANY OF KENYA LTD [2006] eKLR** was also of the same view when he stated as follows:

"From the foregoing, it is abundantly clear that the Plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the Plaintiff to make presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it is only when the court makes an adjudication on the issues that the borrower would know whether or not his beliefs had gained judicial recognition."

36. Clearly, the Plaintiff does not have any colour of right to stop repayments simply because it believes that its account has been overburdened by high interest and charges. I am also of the view that the issue of interest must be determined in the main trial for the injunction to issue.

37. Further, I am also of the view that the grounds raised and canvassed in the application require the court to pronounce on intricate and complicated points of law which have not had the benefit of adjudication. Moreover, issues of repayments by the Plaintiff and the findings by the Interest Rate Advisory Centre (IRAC) cannot be properly determined at this interlocutory stage without the benefit of trial. Additionally, on the issue of the refund of Kshs. 750,000/= there is conflicting evidence on what the same entailed.

38. On the one hand the Plaintiff claimed it was an admission of overpayment by the Defendant, whilst the Defendant alleged that the same was an ex gratia rebate on interest. In sum, this being an interlocutory application, it is not possible for the court to resolve conflicts of evidence, especially with regard to whether there was overcharging of interest by the Defendant as claimed by the Plaintiff.

39. Further in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR,** the court of appeal held that ;-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed." (emphasis added)

40. From the above pronouncement, it is clear that the Plaintiff has to demonstrate to this court that there exists a right which has apparently been infringed by the opposite party to call for an explanation. From the facts presented in this case, the Plaintiff's claim is that it has been overcharged in terms of repayment of the loan it secured from the Defendant. Should this court find that same is true, it can always order for a refund of the overcharged amount. As such, it is my view that there is no urgent necessity to prevent irreparable damage, since such damage can be compensated by way of damages.

41. Additionally, the Plaintiff has not approached the court with clean hands. I say so because in its further affidavit, it was deponed that the Plaintiff serviced its overdraft facility and term loan as required, yet the Bank statements supplied state otherwise. From the Bank Statement at pages 56 to 60 of the Plaintiff's application, it is clear that the Plaintiff did not make repayments as required. From the time of draw down, that is at 1/08/13 the Plaintiff did not pay the agreed installment of Kshs. 254,494.60/= thus attracting penalties on the same. The same goes on for several months. Additionally, despite its deposition

in paragraph 6 of the affidavit of Charles Njoroge sworn on 3rd June, 2015 that it never defaulted on its loans, the same cannot be correct. In all its correspondences to the Defendant, the Plaintiff did admit indebtedness, hence urging the Defendant for restructuring of the loan.

42. With this in mind, I am in agreement with the holding of the court in the case of ***SAMSON ALITON OKELLO v BARCLAYS BANK OF KENYA LIMITED [2009]eKLR,*** where ***Lesiit, J***. observed that ;

> ***"an injunction is an equitable remedy and a party seeking such a remedy must conduct himself in relation to the suit and the matter at hand in a manner that will meet the approval of a court of equity."***

43. Additionally, in **Maithya - vs - Housing Finance Co. of Kenya &Ano. [2003] 1 EA 133, Justice Nyamu** addressed the common problem of debtors who persistently default in servicing their loans. He dismissed the injunction application as he found that no prima facie case had been made out. He stated as follows :

> ***"Those who come to equity must do equity. Failure to service the loan or to pay the lender or to pay into court what had been admitted took the Applicant outside the realm of exercise of the court's discretion."***

44. Since the Plaintiff has not approached the court with clean hands, it should not expect the court to grant him any equitable remedy.

45. Having analyzed the main ground upon which the Plaintiff's application is predicated, it is my view that the Plaintiff has not established a prima facie case with probability of success. Has the Plaintiff demonstrated that it will suffer irreparable loss unless the injunction is granted, which loss would not adequately be compensated by an award of damages? The Plaintiff submits that it will suffer irreparable loss that cannot be compensated by an award of damages because if the Defendant is not restrained from demanding the monthly installments of Kshs. 254, 494.60/-, it shall be crippled financially.

46. I take judicial notice that the Defendant is a reasonably sound financial institution. It stands better chances to compensate the Plaintiff should the Plaintiff succeed in the trial. The Defendant is highly likely to satisfy any decree passed against it. The balance of convenience therefore tilts against the granting of interlocutory injunction.

47. To this end it is my order that the Application be and is hereby dismissed with costs. Parties to comply and the matter be fixed for hearing on a priority basis.

Dated, signed and delivered in court at Nairobi this 27th day of October, 2015.

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C.KARIUKI

JUDGE