

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

CIVIL SUIT NO. 615 OF 2015

ESTHER NJERI NDUNGU & ANOTHERPLAINTIFF

VERSUS

JAMII BORA BANK LTD.....DEFENDANT

RULING

1. The Plaintiffs/applicants have moved Court via a motion dated 8th December, 2015 seeking an injunctive relief pending the hearing and determination of the instant suit. The application is predicated on the grounds that the 1st Plaintiff who owns the suit property **Kiambu/municipality Block 5/814** offered the same as security for a loan of Ksh.15 million advanced to her husband Geoffrey Nganga Kariuki who traded then on 4.6.2013 as Inter Tropical Timber Trading.
2. The said business was subsequently incorporated on 26.11.2013 and the 1st Plaintiff acquired 100 shares (10%). On 18.9.2014, the Defendant offered the 2nd Plaintiff an invoice discounted facilities amounting to Kshs.20,793,904. On 26.9.2015 the Defendant recovered the loan it had advanced to Kariuki. No further charge was executed to secure the subsequent loan.
3. The Defendant amalgamated the loan granted to the 2nd Plaintiff with another loan granted to Powerline Company Ltd which the 1st Plaintiff is not a director.
4. The Defendant agreed to accommodate the 2nd Plaintiff until 13.12.2015 when the 2nd Plaintiff would regularize its payments. However the Defendant has gone behind that promise and commenced the process or realization of the suit land. The suit land was never charged to the Defendant as security for the facility. The Defendant has advertised for sale of the suit property on 16.12.2015. The Applicants also failed to serve Plaintiff with statutory notices of sale.
5. The Plaintiff No. 1 thus laments that though she is not a party to the borrowing agreement; she stands to suffer irreparable loss and damage due to the Defendant action as the suit property is her home. She avers that her claim has very high chances of success.
6. The application is supported by her Affidavit sworn on 8.11.2015 and her further Affidavit sworn on 14.12.2015. She reiterates in her Affidavits what she has set out in here grounds on the face of the motion.
7. In her submissions, she argues that the only amount secured was granted to her husband as a loan which was fully paid and thus her property cannot be security for the subsequent loan facilities to the 2nd Plaintiff and Powerline Company. She also submits that she was not served with Statutory notices, thus the intended sale is unlawful. She challenges the valuation attached by Defendant in the Replying Affidavit as not being genuine as there was no valuation conducted on the dates noted in the same and also for under valuing the property at Kshs.27 million or thereabout, whereas her valuation fixes the same property to be Ksh.35 million.
8. The Respondent has opposed the application and an Affidavit sworn by Christine Wahome on 11.12.2015 was filed on 14.12.2015.
9. The Defendant confirms granting Geoffrey Nganga Kariuki Ksh.15 million loan vide letter of offer dated 12.6.2013 secured by the suit property. The deponent who is the Legal Officer of the Defendant further depones that the 2nd Plaintiff was granted invoice discounting facility of Kshs.20,793,904/=. The 2nd loan did not offset the original loan granted to Kariuki. The original security was never discharged and thus statutory power of sale was never extinguished. Separately, the PowerLine Contractors and Services ltd was offered discounting facilities.

10. On the 2nd Plaintiff's request, the amalgamation of the 2 facilities was done and Inter Tropical Trading Timber Ltd was to hold the entire outstanding balances. The Defendant agreed to above proposal and the global amount became Ksh.33,820,000/=.
11. The repayment was agreed to be Ksh.3,198,006/= per month. The said agreement was not honoured and by 30.6.2015 there was arrears of Kshs.8,851,034.12 and the outstanding debt amounted to Ksh.34,953,912.47/=. In June 2015 statutory notice was issued informing the 1st Plaintiff of the nature and extent of default. Thereafter the 2nd Plaintiff made a proposal to settle the arrears within 60 days by paying Ksh.5 million by 20.10.2015 and all arrears by 13.12.2015. The said proposals which bank accepted were not honoured. The Defendant avers that the statutory notice remained in force even after the proposal.
12. The Defendant also avers that the valuation is proper and reflects the true value of the suit property. The Defendant further contends that the 1st Plaintiff consented to the amalgamation of the loans and thus cannot now purports to lament that she was not a director of PowerLine Contractors Company Ltd thus not a party to the contract.
13. The Defendant submits that the loans remain unpaid despite the bank indulgency to the Applicants. The security is still held and proper and regular Statutory notices were issued. The valuation conducted is also proper and a reflection of the market value of the suit property.

Analysis & Determination

14. After going through the court record, pleadings, motion, Affidavits and parties advocates submissions, I find the issue to be determined is whether the Applicants have established the conditions for grant of the Temporary Injunction as set out in the case of **GIELLA Vs. CASMAN BROWN Case?** The conditions aforesaid are simply that, the Plaintiffs/applicants have to establish a prima facie case with probabilities of success. Secondly the Applicants must establish that if the orders are not granted they will suffer irreparable loss which cannot be compensated by way of damages. And finally, if court is in doubt, the court to result to balance of conveniences to determine in whose favour it tills.
15. It is not denied that the 1st Plaintiff offered suit property as security for the granting of her husband Geoffrey Nganga Kariuki loan of Ksh.15 million in June 2013 and same property was charged. By then he was trading as the Inter Tropical Timber Trading. Subsequently he incorporated the same together with the 1st Plaintiff both being its directors. The company Inter Tropical was further granted further facilities of Kshs.20,793,904/= in September 2014. By this time the security was not discharged nor is there evidence of the demand for the discharge of the same. PowerLine Contractors & Services ltd was also offered facilities by the Defendant which were amalgamated to the facilities granted to Inter Tropical Company.
16. The 1st Plaintiff husband was a director of the said PowerLine Contractors & Services Ltd. The Plaintiff No. 1 is a director of the 2nd Plaintiff and she seems not to have objected to the amalgamation of the facilities.
17. By a letter dated 29.4.2015, the Defendant demanded arrears of Kshs.3,198,005.56/= and quoted the loan balances amounting to Ksh.34,785,005/= as by 29.4.2015. The letter was addressed to the Directors of the Inter Tropical Company of which 1st Plaintiff is a director.
18. On 30.6.2015 a Statutory notice was issued to the first Plaintiff and copied to the Directors of the 2nd Plaintiff and Geoffrey Nganga Kariuki which was registered and also emailed via cited account. The certificate of postage is annexed CW-6(b).\
19. The Inter Tropical Director one Geoffrey Nganga Kariuki did on 12.10.2015 offer to settle arrears within 60 days prompting the Defendant to set out the settlement terms on 13.10.2015 ie. by payment of Ksh. 5 million by 30.10.2015 and the balances of arrears by 13.12.2015.
20. The Plaintiff No.1 has not rebutted the aforesaid evidence nor complained that she was not a party to the aforesaid proposals. The Plaintiff No.1 has never questioned the continued holding of the security as she and her husband traded with the facilities provided by the Defendant. The 1st Plaintiff in her Affidavit acknowledges that the Defendant and the Plaintiff No. 2 had agreed to settle the arrears by 13.12.2015 and thus the bank is breaching contract by realizing security before that dated vide here paragraph 26 of the Supporting Affidavit.
21. On the cited authority of **KISIMANI HOLDINGS LTD & ANOTHER Vs. FIDELITY BANK**

LTD HCC. NO.744 of 2012 cited by the Applicants, the same can be distinguished in that, in the trial there were no offers to settle the loans by the Applicants nor did the chargor allow the further advances as in our instant case. Though the 1st Plaintiff deny consenting to further advances, she has never protested on holding of her security and in any case as a director of the 2nd Plaintiff she never questioned the further loans granted to the Company and even to the amalgamation of the 2nd Plaintiff with PowerLine Company loans.

22. On the basis of the materials before the court, the court relies on the case of **MRAO Vs. FIRST AMERICAN BANK LTD & 2 OTHERS** which held that;

“a prima facie case is more than arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”.

23. The Applicants in the instant case have fallen short of the aforesaid standards set by authority cited. We need not to consider limbs 2 and 3 of GIELLA once the first condition of GIELLA case is not established. See **GACHIMU Vs. KAGUNDA & 20 OTHERS ELC 619/2014**.

24. However, the court noted that the bank was inclined to indulge the Applicants in the rescheduling the repayment. The Applicants advocate in his oral submissions contended that the Applicants were promised by the Defendant that it would allow them to pay Ksh.10 million on or before 27.12.2015 and the balance to be cleared within 90 days time thereafter. The court will extend its discretion and empathy on the side of the Applicants and in a bid to encourage the settlement of the claim and make the following orders.

1. The sale scheduled on 11.12.2015 be and is hereby suspended on condition that Ksh.100,000/= is deposited with Defendant at 11 am on 16.12.2015.
2. Thereafter Ksh.10 million be deposited with Defendant on or before 15.1.2016.
3. The outstanding loan balance must be paid within 90 days thereafter.
4. In default of any of the above (1)(2) and (3) the bank to proceed with sale of the security without any further delay.
5. Costs assessed at Ksh.20,000/= for the application to the Defendant in any event.

Dated, signed and delivered in court at Nairobi this 16th day of December, 2015.

C. KARIUKI

JUDGE