



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

HCC NO. 143 OF 2014

DIRECTLINE ASSURANCE COMPANY LTD.....PLAINTIFF

-Vs-

JAMII BORA BANK LTD1ST DEFENDANT

ALUIYA OMAR AHMED.....2ND DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated 11th of April 2014 and filed in court on 14th April 2014. The application was filed under the cover of a Chamber Summons of the same date seeking leave, which was granted, for the motion to be heard during the April 2014 vacation.

2. The application seeks the following Orders;

a. That the application herein be certified urgent, service thereof be dispensed with and the same be heard *ex parte* in the first instance.

b. That the Honourable court be pleased to grant a temporary injunction restraining the 1st Defendant, its agents and/or servants from setting off, handling or dealing with the Plaintiff's deposit of **Ksh.24,847,315/=** held by the 1st Defendant under **FDR Receipt No.0292062788** in any manner whatsoever pending the hearing and determination of this application.

c. That the Honourable court be pleased to grant a temporary injunction restraining the 1st Defendant, its agents and/or servants from setting off, handling or dealing with the Plaintiff's deposit of **Ksh.24,847,315/=** held by the 1st Defendant under **FDR Receipt No.0292062788** in any manner whatsoever pending the hearing and determination of this suit.

d. That in the alternative to prayer 3 above, the Honourable court be pleased to order that a sum of **Ksh.20,960,000/=** belonging to the Plaintiff that is held by the 1st Defendant under **FDR Receipt No.0292062788** be deposited in court pending the hearing and determination of this suit, with a mandatory injunction being issued to compel the 1st Defendant to release the balance thereof, namely **Ksh.3,887,315/=**, to the Plaintiff herein.

e. That the cost of this application be borne by the 1st Defendant.

3. The application is premised on the grounds set out therein and is supported by the Affidavit sworn by **SANDRA NYAKWEBA** dated 11th April, 2014 and her Supplementary Affidavit dated 23rd June 2014.

4. The application is not opposed by the 2nd Defendant. However it is opposed by the 1st Defendant vide a Replying Affidavit sworn by **FRED CHUMO** dated 4th June 2014. With the leave of court parties filed written submissions to the application which were highlighted through oral submissions.

5. The brief history of the application is that the same was filed simultaneously with a Plaint claiming various reliefs stated therein based on a Corporate Guarantee of Kshs.20,960,000/= given to the 1st Defendant to secure a loan of Ksh.41,920,000/= extended to the 2nd Defendant. The Plaintiff agreed to provide the said Corporate Guarantee on two conditions namely that the 2nd Defendant fully complied with the terms of the letter of offer dated 12th October 2012 prior to disbursement of the loans, and secondly that the 1st Defendant opened an escrow account to which the Plaintiff would deposit a sum of Ksh.20,960,000/= to be held under a lien.

6. The Plaintiff/Applicant now alleges that in contravention of above agreement, and without any notice to the Plaintiff, the 1st Defendant disbursed the loan to the second Defendant before either the 1st or the 2nd Defendant had fully complied with the terms adumbrated above. It is alleged that the 1st Defendant disbursed the loan ;

a. Without requiring the 2nd Defendant to open the fixed deposit account of Ksh.20,960,000/=.

b. Without requiring the 2nd Defendant to open a current account through which the 2nd Defendant would channel all its banking to the 1st Defendant.

c. Without opening an escrow account to which the Plaintiff could deposit the sum of Ksh.20,960,000/= that was to be held under a lien.

d. Before receipt of the Corporate Guarantee from the Plaintiff.

7. The Plaintiff now alleges that the purported guarantee was never executed and that indeed there was no guarantee at all under which the 1st Defendant bank can purport to offset the aforesaid sum of Ksh.20,960,000/=.

8. The 1st Defendant in reply stated that there was indeed a Guarantee executed by the Plaintiff the basis of the bank's action. In addition the 1st Defendant stated that there was also a Memorandum of Understanding upon which the 1st Defendant acted.

9. I have carefully considered the application and the opposition to it. I have also considered the written and oral submissions of the parties. Clearly, the only issue for consideration is whether or not there was a Corporate Guarantee to validate the action taken by the 1st Defendant bank to offset Ksh.20,960,000/= belonging to the Plaintiff.

10. To determine this issue I refer to annexure **SN4** of the Supporting Affidavit of **SANDRA NYAKWEBA**. This is a Deed of Guarantee duly filed in by the Plaintiff for a sum of **Ksh.20,960,000/=**. However, the said Deed of Guarantee is neither executed nor dated by the Plaintiff. Annexure **SN6** to the said Supporting Affidavit is a letter dated February 7th 2013 allegedly by the Plaintiff (there is no evidence that it originated from the Plaintiff) forwarding an executed Memorandum of Understanding to the 1st Defendant with a request that the 1st Defendant ***“kindly confirm to us in writing once the customer complies with all the conditions and before you release the funds”***. Annexure **SN7** and **SN8**

are letters addressed to the 1st Defendant either seeking further information on the lien, the said Corporate Guarantee or the Memorandum of Understanding. It is also clear that by 17th September 2013, the 1st Defendant Bank had not responded to the said letters. By their letter dated 17th September 2013, apparently in despair, the Plaintiff stated as follows to the 1st Defendant – at last paragraph.

“As we are supposed to furnish security for the facility, we are also entitled to have sight of the documentation and any correspondence regarding the loan facility”.

11. These correspondences reveal a bank which did not care how the purported Guarantor felt on the issue, a bank which became rouge and refused to fill in the Guarantor with the necessary information; A bank which went ahead to disburse the loan to the borrower in violation of its own terms contained in the letter of offer; a bank which appeared to work in collusion with the borrower.

12. Clearly, in my finding, the issue of validity of the said Guarantee is crucial to this case. The validity of the said guarantee is questionable, and more so the conduct of the bank. These findings would militate that an order restraining the bank from offsetting the said Kshs.20,960,000/= be granted pending the hearing and determination of the suit. In my view a prima facie case with high probability of success has been established.

13. However, the Defendant has submitted that the Orders sought at prayer 3 have been overtaken by events as the bank is said to have effected the set off of the sum of **Ksh.20,960,000/=** on 15th April 2014 leaving a balance of **Kshs.4,351,963.28** and that being so, it is submitted for the 1st Defendant that courts do not give Orders in vain. I agree that a court cannot give Orders which cannot be effected. However, in the present case, the money has been offset merely from the Plaintiff’s account into another account within the bank. The said money stays safe where it is. The bank can hold that money as security subject to the interests applicable under the FDR Receipt No.0292062788. It is clear to me that the offsetting of the said amount is disputed until the validity of the said Guarantee is established in this court in a trial. Before that is done, however, the said sum of Kshs.20,960,000/= belongs to, and is the property of the Plaintiff regardless of where it is held provided that it continues to attract the same interest under the said FDR Receipt No.0292062788.

14. Before I conclude this ruling I must make a comment about the 2nd Defendant, although the said Defendant did not oppose this application. Clearly the second Defendant is the beneficiary of the said loan, and the primary cause of these proceedings. It is amazing, however that the 2nd Defendant is not making any attempt to repay the loan. Although the 2nd Defendant is not opposed to this application, it is important that the 2nd Defendant makes serious attempts to repay the loan. This is a court of equity. It may be that the 2nd Defendant conduct in this matter may be questioned in these proceedings, and the cleanliness of the 2nd Defendant hand may come under a judicial microscope.

15. In the upshot I allow the Plaintiff’s application and make Orders as follows:

a. The sum of Ksh.20,960,000/= which the 1st Defendant has purportedly offset from the Plaintiffs FDR Receipt No.0292062788 shall not be used for the purposes of satisfying the alleged Corporate Guarantee given by the Plaintiff, but shall be retained by the 1st Defendant in a special account as a security for the said loan to the 2nd Defendant pending the hearing and determination of this suit.

b. The said sum of Kshs.20,960,000 kept in the said special account by the 1st Defendant shall continue to attract the same interest as in the said FDR Receipt No.0292062788 pending the hearing and determination of this suit.

c. The costs of this application shall be for the Plaintiff/Applicant.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014.

E.K.O OGOLA

JUDGE

PRESENT:

Kuria for Plaintiff/Applicant

Thiga holding brief Njoroge for 1st Defendant

Teresia – Court clerk