



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL SUIT NO. 60 OF 2013

ZUM ZUM INVESTMENT LIMITEDPLAINTIFF

VERSUS

HABIB BANK LIMITEDDEFENDANT

RULING

The Plaintiff in its Notice of Motion application dated 22nd day of May, 2013 and brought under order 40 rule 1, 2, 3 and order 51 rule 1 of the Civil Procedure Rules 2010. Section 1A, 1B and 3A of the Civil Procedure Act, seeks restraining orders by way of an injunction from advertising, selling by public auction through Intime Auctioneers or otherwise, transferring and or in any manner whatsoever exercising its statutory power of sale with regard to plot No. 8408/Section/11 M.N. pending the hearing and determination of this suit.

The grounds are that the Defendant had changed the rate of interest thus,

- I. **On the Ksh. facility on the borrowing from 14% per annum to 25% per annum on the borrowings and 36% per annum to 42% per annum on the amounts in excess of the overdraft limit (default rate).**
- II. **On the US dollars facility on the borrowing from 6% per annum on the borrowing to 7% and 12% per annum in excess of the overdraft limit (default rate).**

That the overdraft facility extended to the plaintiff was for Ksh. 60,000,000/= and US dollars 1,800,000 which at the rate of the exchange rate of Ksh. 80/= to a dollar is Ksh. 144,000,000/=.

Further that the unilateral and unlawful variation of the interest, rates have had the effect of compounding the plaintiffs indebtedness to the Defendant making it impossible to redeem the loan.

That the Defendant has valued the suit premises at a forced sale value of Ksh. 312 million whereas the charged property is worth Ksh. 840 million and further that the plaintiff is looking for ways and means to redeem the loan by selling the charged property and by advertising the suit property to Defendant is scaring away potential buyers.

This application is supported by two affidavits of Abdulkarim Saleh Muhsin. The background to this suit is captured in the replying affidavit by **Patrick Maina Mwangi** the Defendants Vice President and Head of Credit which I reproduce herein below.

“By a charge dated 18th May, 2010 the plaintiff offered the property L.R Number

8408 Section 11 Mainland North (CR 33126) to secure the sum of Ksh. 100 million borrowed by Akaba Investments Limited (the borrower) which sum was to accrue rates until payment in full”.

Under the first charge the contractual rates of interest were provided for thus,

(a) The Defendants was to charge interest at the rate of 15% per annum or at such per annum rate or rates agreed in writing from time to time between the Defendant and the Borrower and in the event the rate was not agreed, it was to be determined by the Defendant at its sole discretion. The interest was also to be calculated on daily balances debited monthly by way of compound interest.

(b) The bank was entitled to vary the rate of interest from time to time to such other per annum rate as the bank was of the opinion represented the per annum rate as the bank was of the opinion represented the per annum rate commonly chargeable by banking and financial institutions from time to time in relation to the facilities made available to the borrower and having regard to such other circumstances as the bank would deem appropriate, the decision of the bank not to be questioned by the charger or the borrower on any account whatsoever.

(c) The Defendant was not under any obligation to communicate such changes in the rates of interest or any reasons for the modification and or cancellation to the borrower or the plaintiff.

At the plaintiffs request the Defendant renewed and enhanced the borrowers's credit facilities which were to be offered in Kenya Shillings and United States Dollars in July, 2011. The Defendant offered an overdraft facility of Ksh. 60 million and three facilities by way of short term loans in United States Dollars amounting to USD 1, 800,000.

By a variation of charge and further charge dated the 16th day of August 2011, the plaintiff offered property L.R. NO. 8408 Section 11 Mainland North (CR 33126) to secure the sum of Ksh. 60 million and the sum of USD 1,800,000 to **Akaba Investments Limited** (the borrower). The sum was to accrue interest at contractual terms until payment in full.

Under the further charge, the Contractual rates of interest and other charges were provided for as follows:

(a) The Defendant was entitled to vary its commission, costs, interest, charges, expenses and covenants and provisions relating to the repayment of the charge debt.

(b) The Defendant was to charge interest at the banks base lending rate 16% per annum minus 2% per annum on the Kenya Shillings facility at 3 months US dollars Libor plus 4% per annum with a minimum rate of 6% per annum on the USD facilities and guarantee commission at 0.25% per quarter or at such other rate or rates and upon the terms from time to time as agreed between the Defendant and the Borrower and in the event the rate was not agreed it was to be determined by the Defendant at its sole discretion.

(c) Interest would be calculated on daily cleared balances and compounded in the event of it not being punctually paid with monthly rates and secured in the same manner as the principal moneys secured but without prejudice to the rights of the Defendants to require payment of such interest when due.

(d) If the borrower defaulted in making payments or exceed the authorized limit for banking facilities the amount in arrears or in excess would henceforth bear interest from the due date of such payment until actual payment thereof at the rate of 36% per annum on Kenya Shillings facility and at 12% on the USD facility or at such other rates over and above the agreed rates.

The Defendant contends that the allegation that it had undervalued the charged property is not true in that the charged property is a block piece of land which is not subdivided. The valuation report by Tysons

took the property as it is.

That the report sought to be relied on by the plaintiff giving the value as Ksh. 840,000,000/= is speculative given that the property had not been sub divided at the time it was offered up for security purposes and further that it cannot purport to make plans for the subdivision of the property when it offered it up for security and vested a statutory power of sale on the Defendant.

The principles applicable to the grant of injunctions were set out in the case of **Giella – Vs- Cassman Brown & Co. Ltd. & Another (1973) EA 358** as follows;

1. **The applicant must show a prima facie case with a probability of success at the trial**
2. **An interlocutory Injunction will not be granted unless it is shown that the applicant will suffer an injury which cannot be compensated by damages.**
3. **On a balance of Convenience**

Counsel for the Defendant Mr.Gitonga has submitted that the plaintiff has not demonstrated that It has a prima facie case with a probability of success in that the plaintiff is not the borrower. The principal debtor has not repaid the debt.

As to whether damages are sufficient remedy counsel submits that the damages are quantified and therefore sufficient remedy.

On the issue of balance of convenience he submits that the plaintiff admits that for the last two years it has not made repayments.

Counsel has cited the case of **Middle East Bank Kenya Ltd. Versus Miligan Properties Ltd. Civil Appeal No. 251 of 1998** where it was held that a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being conducted.

Counsel for the plaintiff Mr. Karie submits that there was on the part of the Defendant a unilateral variation of interest rates which was unlawful.

Further that it is not denied that the plaintiffs property was used as a security for money borrowed by another company going by the name and style of Akaba Investments Limited but for use by the plaintiff.

It is also conceded that the plaintiff was not the principal borrower but its sister company though it was the plaintiff who had initially made the application to borrow.

It is counsel's submission that the Defendant has grossly undervalued the charged property at Ksh. 390,000,000/= whereas its true worth from the current valuation is Ksh. 840,000,000/= and if the injunction is not granted it will suffer the loss of Ksh. 500 million.

The plaintiff in the alternative prays that it be granted a grace period of 4 months.

Counsel for the plaintiff Mr. Kiarie relies on the case of **Kwality Candies & Sweets Ltd. - Vs. Industrial Development Bank Ltd Civil Case No. 418 Milimani** where Emukala Judge granted injunctive orders for three months pending further orders of the Court.

He had exercised the discretion given to the Court by order 39 rule 12 now order 40 rule 2 of the Civil Procedure Rules 2010 which provides,

“In any suit for restraining the Defendant from committing a breach of the contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after Judgment, apply to the Court for a temporary injunction to restrain the Defendant

from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2)The Court may by order grant such injunction on such terms as to an injury as to damages, the duration of the injunction, keeping an account, giving security or otherwise as, the court deems fit”.

It is not lost on the court that what is before it is an affidavit evidence and it is not called upon at this stage to make final determination of issues. The main issues by the plaintiff being that the Defendant had unilaterally, unfairly and unlawfully changed the rates of interest and secondly that the Defendant has undervalued the suit premises and that its action is manifestly unfair oppressive and an act of bad faith.

On the issue as to whether the plaintiff has demonstrated that it has a prima facie case with probability of success, I agree with counsel for the Defendant Mr. Gitonga that the plaintiff is not the borrower and the principal debtor has not repaid the debt.

As to whether damages are quantifiable the plaintiff itself has quantified its loss as Ksh. 500 million, if the orders of injunction are not granted. It has not been shown that the Defendant which is a bank would not be in a position to pay that amount.

I also agree with the decision in *Habib Bank Ag Zurich- Vs- Pop-In (K) Ltd Civil Appeal No. 147 of 1989* whereby it was held,

“That a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute to the amount due under the mortgage”.

And also the holding in *Middle East Bank Ltd. - Vs. Maligan Properties Ltd. Court of appeal Civil Appeal No. 251 of 1999.*

Where it was held that ,

“a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely, on the ground that the mortgagor has begun action or for redemption or because the mortgagor objects to the manner in which the sale is conducted. As the mortgage debt was overdue for payment, the Defendant was not obliged to wait for market conditions to improve before exercising its statutory power of sale.

Again, there was no evidence before the learned Judge to hold that power of sale was being exercised oppressively by the appellant.

In the present case there is the issue of undervaluation which the Defendant has denied and terms the valuation report presented by the plaintiff of Ksh. 840,000,000/= as speculative given that the property had not been subdivided at the time it was offered up for security purposes.

I find that there is a huge margin on the valuation of the suit premises between the figure of Ksh. 390 million presented by the Defendant and that of Ksh. 840 million presented by the plaintiff. There is real likelihood that the power of sale may be exercised oppressively and or capriciously.

In view of the above and in accordance with the provisions of order 40 rule 1, 2, 3 I will grant the injunction sought. The applicant had asked for 4 months duration in the alternative. Upon deliberation on the matter I find 45 days will not prejudice any of the parties.

Accordingly an injunction is granted but only for 45 days from today.

Costs in the cause.

Ruling read and delivered this **25th** day of **September, 2013**.

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M. MUYA

JUDGE

25TH SEPTEMBER, 2013

In the presence of:-

Learned Counsel for the plaintiff Mr. Kiarie Kariuki

Learned Counsel for the Defendant Kanji holding brief H. H. Mathews