REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 709 OF 2009

JOHN JOEL KANYALI.....PLAINTIFF

- VERSUS –

FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

RULING

1. By a chamber summons application dated 22nd October 2009, the plaintiff, in the main, prays for an injunction to restrain the defendant bank from selling his property known as Kwale/Diani Beach/603. The plaintiff also seeks an account over the term loan account number 7020-0005, 7020-0011 and overdraft account 1110-0005 held with the defendant for purposes of an independent audit. He also prays for costs.

2. The application is based on facts set out in the affidavit of the plaintiff sworn on 22nd October 2009 as well as a supplementary affidavit sworn on 24th October 2011. The plaintiff executed a charge over the said property in favour of the defendant bank dated 26th March 2008 to secure borrowings in the principal sum of Kshs 7,000,000. The plaintiff subsequently executed a further charge over the same property dated 11th July 2008 to secure further borrowing of Kshs 3,000,000 bringing the total charge debt to Kshs 10,000,000. It is instructive that it is the plaintiff who applied for those loans, executed the respective letters of offer and the two charge instruments.

3. A dispute has occurred over the repayment and the rates of interest applied by the bank. The bank in the meantime issued a statutory notice under section 74 of the Registered Land Act to realize the security and further instructed Thaara Auctioneers to issue a notification of sale for sale of the suit property on 26th November 2009. The statutory notice dated 8th June 2009 was demanding Kshs 15,111,443.25.

That sum the plaintiff contests as being a lump sum loaded into the overdraft account and thus creating an "artificial" default and cannot then be the basis of the statutory notice. The plaintiff wrote letters over this matter to the bank and visited the bank to reconcile the accounts but to no avail. In summary, as I understood it, the plaintiff avers that the alleged arrears constitute sums, transferred to the two loan accounts from disputed interest charged between April- July 2008 and August – October 2008. The plaintiff also avers that the revolving overdraft was only for Kshs 2,000,000 and was meant to be repaid within 60 months but the defendant called in the debt within 6 months. The plaintiffs case then is that the two loans have been repaid regularly. There is also an averment that the charge was primarily for the land on which the plaintiff was putting up a building. The plaintiff refers to other unwritten agreements or

understandings between the parties that once the building on the suit land was complete, he was to substitute the charge to another property known as Kwale/Diani Beach/Block/605.

4. These are the reasons, why the plaintiff prays for injunctive relief and for an account. The defendants position as captured in the two replying affidavits of Rana Sengupta sworn on 28th October 2009 and 27th October 2011 is that the initial charge debt of Kshs 7,000,000 was payable from 30th August 2008 while the second loan was repayable from the 30th day after the first draw down, that is in August 2008. The overdraft in turn was to be operated within a credit limit of Kshs 2,000,000 which it surpassed in September 2008.

The position is reflected in the statement of account (Exhibit RS 2) which reflects the default sums demanded in the statutory notice. The oral agreement to substitute the charged property for another was denied by the defendant. On the matter of disputed interest the defendant avers that the interest was payable from the date of draw down and accordingly disputes the version of the plaintiff set out at paragraphs 5,6,7,8,9,12,13,14,15 and 16 of the supporting affidavit. The defendant avers that it tried its best to accommodate the plaintiff. The last time was when it agreed to the overdraft of Kshs 2,000,000 which the plaintiff has failed to honour. In sum, the defendant's case is that the plaintiff has defaulted on the loan and overdraft accounts and that the statutory notice is proper as well as the notification of sale and the plaintiff's application is without merit and for dismissal.

I have considered all the pleadings, depositions and submissions by the parties as well as the various decided cases referred to in those submissions. I am grateful to both learned counsels.

5. I have taken the following view of the matter. It is common ground that at the plaintiff's request and instance, the defendant granted him loan and overdraft facilities in the total of Kshs 10,000,000. The borrowing was secured by a legal charge for Kshs 7,000,000 over the plaintiffs property Kwale/Diani Beach/Block 603 and by a further charge of Kshs 3,000,000 dated 26th March 2008 and 11th July 2008 respectively.

6. A dispute has occurred primarily over the following areas. First is a question of accounts and whether the sums now claimed by the plaintiff or in the statutory notice of Kshs 15,111,443.25 as at 8th June 2009 are truly due from the plaintiff, or were drawn down. Second is the plaintiff's claim that irregular debits of interest have been lumped on top of the loan or overdraft account to create an artificial default. Third is the plaintiff's claim that it has regularly paid the debt and is not in default. On that aspect, the defendant's position is that the plaintiff is in default and that accordingly, the statutory notice is regular and so is the process of sale to realize its security.

And then there are the alleged oral agreements or undertakings to substitute the charged property with another. And there are also the orders of consent of 17th February 2010 and 2nd March 2010 under which certain payments were ordered to be made.

7. My view is that most of those matters can only be fully ventilated at the trial and on tested evidence upon cross-examination; what is critical now is whether the plaintiff by the pleadings and depositions before the court has reached the threshold for grant of interlocutory injunction. The principles for grant of injunctive relief in East Africa were well settled in the decision of *Giella vs CassmanBrown & Company*[1973] E.A. 358. Those principles are, first, that the applicant must show a prima facie case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience.

In addition, there is ample authority that an injunction, which is a discretionary remedy, may be denied despite fulfilling some of the conditions above, if the applicant has committed acts or misconducted

himself in a manner that would not meet approval of equity. *See Anne Njeri Mungai Kihiu vs The Standard Group Limited* HCCC No 435 of 2011 (unreported).

8. On the face of it, I am satisfied that under the terms of the consent orders aforementioned, the plaintiff has only paid Kshs 4,641,824 out of the amount due of 7,824,779 due by 31st October 2011. The plaintiff is not claiming that he has paid the entire charge debt. The closing balance as at 30th September 2011 still reflects a debit balance of Kshs 12,032,612.05. The plaintiff contests these figures and raises up cudgels with the interest sums lumped up on the debt. Does this entitle the plaintiff to an injunction?

In Kenya Hotels Ltd Vs KCB and Another [2004] 1KLR the court was of the view that an injunction being an equitable remedy, the court may, while remaining faithful to the three principles in *Giella's* case still look at other matters of conduct of parties.

9. Recently, I expressed the following view in *Five Forty Aviation Ltd Vs Lufthansa Technik Aero Alzey Gmbh* Nairobi HCCC No 253 of 2011; "I am of the considered view that it is not the business of the courts to rewrite contracts for the parties. It makes perfect business sense. A court should only intervene if the terms are so unconscionable or against public policy as to invalidate the contract. This is not a novel proposition. It was so held by Ringera J, as he then was, in *Morris & Company Ltd Vs Kenya Commercial Bank Ltd* [2003] 2 E.A. 605 when he stated;

"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal".

So the plaintiff is bound by the terms of the letters of offer and the charge instrument.

10. Regarding the disputed sums due or rates of interest, I hold the view that the mere dispute cannot form the basis of grant of injunction. See for example *Waudi vs National Bank of Kenya* HCCC no 604 of 2001 [2002] KLR 254 and *Mrao Ltd Vs First American Bank of Kenya Ltd and another* [2003] KLR 125.

In *Mrao* case (Supra) the court of appeal at page 129, Kwach J, stated

"if courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether ……."

With regard to the oral agreements or understanding to substitute the charged property for another, I have not seen sufficient evidence in that regard and I am also alive to the well settled principle that such oral evidence cannot, in such circumstances, transplant the written contracts in the letters of offer and charge.

11. I am unable to say in all those circumstances that the plaintiff has made out a *prima facie* case. I am also not persuaded that damages in this case would not be an adequate remedy if the suit property is sold. Certainly, no evidence has been led to show the defendant bank would not meet such payment of damages. *See Ooko Vs Barclays Bank of Kenya Ltd* [2002] 2 KLR 394 at 398.

12. Lastly, the plaintiff's other prayer for the defendant to provide all statements of account over the two loan agreements from inception to current date and for purposes of analysis and reconciliation by an independent auditor/financial analyst is a matter best left to the trial court. If finally it were to turn out that the plaintiff is correct and the defendant wrong on the accounts or whether there is default, the remedies the plaintiff prays for at prayers (d) (e) and (h) of the plaint may be suitable. I have not seen sufficient evidence at this stage, at least from the statements of accounts annexed to the respondent's two

replying affidavits aforesaid, to warrant grant of the prayer for an account at this stage.

13. The upshot of all those deliberations and for the reasons aforementioned is that the plaintiff's chamber summons dated 22nd October 2009 is hereby dismissed with costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 17th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
Mr. Tom Kopere for the Plaintiff.

No appearance for the Defendant.