REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Commercial Civil Case 12 of 2009

AFRICAN SAFARI CLUB…….PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA…….DEFENDANT

RULING

Before me is an application for two primary orders expressed as follows:-

(a) **That the defendant be restrained from selling and/or otherwise dealing and/or interfering with the plaintiff's properties on LR Nos. Watamu 28, 32, 22, 34, 36,49,52, 53, 54, 55 and 64 and all developments thereon pending hearing and disposal of this suit.**

(b) **That the defendant be restrained from purporting to exercise receivership and/or put up advertisements relative thereto in relation to the plaintiff pending hearing and/or disposal of this suit**

The application has been brought under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules, sections 3A, 63 (e) of the Civil Procedure Act and all other enabling provisions of the Law. The background is as follows: The plaintiff and the defendant have had a long customer/bank relationship dating from 1975 to date. The defendant initially advanced the plaintiff Kshs. 7,000,000/= which sum was secured by a debenture over the plaintiff's assets and a legal charge over LR Nos. 11732, 11609, 11610, 11739, 11740, 11741, 11589, 11590, 12531, 12668 and 13086. There was default and renegotiation and a single term lean of Kshs. 24,000,000/= created and secured in the same manner in 1978. The default persisted and at the defendant's request in November 2002, the plaintiff's entire indebtedness was agreed to be Kshs. 430,000,000/= which the plaintiff agreed to repay over 48 months. The defendant contends that, of that sum, the plaintiff paid only Kshs. 160,000,000/= leaving the sum of Kshs. 270,000,000/= owing and thus provoking the appointment of receivers and managers by the defendant on 30th January 2009.

The defendant subsequently sought to realize the said securities which threat triggered this action and application. The reasons given for the application are that the threatened action could result in irreparable loss and/or injury to the plaintiff; that the sum due is disputed and has been calculated in disregard of the provisions of the Banking act and the Central Bank of Kenya Act; that the purported appointment of the receivers is contrary to the Law; that the defendant threatens to exercise its powers over property not charged and that the defendant's conduct is high-handed.

The application is supported by an affidavit sworn by one Frank Neugebauer, a director of the plaintiff. The affidavit is an elaboration of the above grounds. In addition, service of the notice of appointment of the receivers/managers is challenged. Also challenged is the sum allegedly due. The said director also swore a supplementary affidavit, in response to the defendant's replying affidavit. The said replying affidavit is sworn by one Zipporah Kinanga Mogaka, the defendant's General Manager in charge of Legal and Remedial Management. The affidavit details the relationship between the plaintiff and the defendant and concludes that the plaintiff is indebted to the defendant in excess of Kshs. 270,000,000/=. Annexed to the affidavit are numerous exhibits including the last offer made to the plaintiff and promises made by the plaintiff to settle its indebtedness with the defendant.

I have considered the application, the affidavits filed, the annextures thereto, and the submissions of counsel. Having done so, I take the following view of the matter. The principles applicable for the grant of an interlocutory injunction are now well settled. The same were crystallized in the case of **Giella – v – Cassman Brown & Company Limited and Another [1973] EA 358.** Firstly, the applicant must show a prima facie case with a probability of success at the trial but if the court is in doubt, it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot

be compensated in damages. It must also be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted where it is shown that the applicant's conduct with respect to matters pertinent to the suit does not meet the approval of a court of equity.

The plaintiff challenges the defendant's appointment of receivers/managers on the basis that the said appointment was unlawful. The plaintiff does not substantiate the basis of that contention. If the contention is made because of want of service of the notice of appointment, I am not so persuaded. The defendant advertised the appointment of the receivers/managers in the press and has exhibited evidence of the same. The plaintiff has said nothing about that. Even if the appointment had not been advertised in the press, I would still hold that the plaintiff was validly served and in response thereto sought a renegotiation of its indebtedness with the defendant. It is significant that there was no immediate challenge against the said appointment until the defendant sought to realize its securities.

The plaintiff also challenges the sum due on the ground that the debt is calculated in disregard of the provisions of the Banking act (sec. 44 thereof) and the Central Bank of Kenya (Amendment Act) 2000. That allegation is not supported by particulars of the challenge. I, prima facie, accept the defendant's response to that challenge that in calculating the sum due, it did not contravene the provisions of the Banking Act and the Central Bank of Kenya Act. The plaintiff does not challenge the Statutory Notice of Sale. It also admits indebtedness to the defendant. Its own consultants, Interest Rates Advisory Centre, put that indebtedness at Kshs. 175,595,174.49 as at 30th September 1994 (See annexture "L" to the affidavit of Frank Neugebauer in support of the application). The plaintiff's complaint would in the circumstances appear to be a dispute over sums due which cannot be a ground for restraining the defendant once its statutory power of sale has crystallized. There is a plethora of authorities on the point and if one is required (see **Mrao – v – First American Bank of Kenya Limited and others [Civil Appeal No. 39 of 2002],** where Kwach J.A. as he then was cited with approval the following extract from Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725:-

> **"725. When mortgage may be restrained from exercising power of sale.**
>
> **The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute……..or because the Mortgagor objects to the manner in which the sale is being arranged……..."**

Before concluding this matter I cannot resist referring to the order recorded by consent of the parties on 1st April 2009. The order is as follows:-

> **"By consent the plaintiff/applicant shall deposit with the defendant sum of Kshs. 120 million on or before 25.6.2009 and shall also submit a settlement proposal within the same period.**
>
> **Mention 10.07.09 for further orders or highlighting written submissions if no agreement is reached.**
>
> **Interim orders extended until 10.07.09……..."**

When the case was mentioned on 10th July 2009, no settlement had been reached. To date no settlement has been reached. Given the record of this file, it would seem that this case is an open and shut case. In the premises, I have not been persuaded that the applicant/plaintiff has established a prima facie case with a probability of success at the trial. Having come to that conclusion, strictly speaking, I need not consider the other conditions for the grant of an interlocutory injunction. However, even if I were to consider the application under the condition that an injunction ought not to issue where damages would be an adequate remedy, I would have no hesitation in rejecting the application as the applicant in offering its properties as a security clearly gave the same a value and if sold damages would adequately compensate the applicant. With regard to balance of convenience, I would still reject the application as further delay in the realization of the securities might diminish their value as security for the repayment of the increasing indebtedness to the defendant. Balance of convenience accordingly tilts in favour of the defendant.

The upshot of my above consideration of the plaintiff's application dated 9th March 2009 is that the same is without merit and is dismissed with costs to the defendant.

DATED AND DELIVERED AT MOMBASA THIS 29TH DAY OF APRIL 2010.

F. AZANGALALA

JUDGE