



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 253 of 2008

CURACID KENYA LIMITEDPLAINTIFF

VERSUS

EAST AFRICAN DEVELOPMENT BANK.....DEFENDANT

RULING

As admitted by the plaintiff, this litigation originates from a written contract entered into between the parties which contract confers right to each party and creates obligation to be fulfilled and to be performed by each party. Subsequent dealings between the parties in the performance of the said contracts have also been reduced into writing and all these written documents clearly show and provide evidence as to which party has fulfilled or failed to fulfill its obligation under the contract. It is clear that the parties entered into a loan agreement on 18th July, 2002 which agreement required the plaintiff to commence repayments as specified herein. The plaintiff was unable to fulfill its repayment obligations under the contract in 2004 and requested the defendant to reschedule the commencement date of the repayment principal sum to 15th March, 2005.

The defendant acceded to the plaintiff's request for rescheduling the said payments and waived its right of treating the plaintiff's failure as a breach of contract through a letter dated 5th November 2004. The plaintiff again failed to pay or fulfill its obligation under the revised arrangement and made a second request on 2nd November 2005 to the defendant for rescheduling of the commencement date of the repayment of the principal sum to 1st September 2006. For the second time the defendant again accepted the plaintiff's request and granted the said extension.

The plaintiff once more failed to fulfill its obligations under the second revised arrangement and made a third request to the defendant to reschedule the commencement date of the repayment of the principal sum to September 2007. It appears the parties did not reach an agreement and the defendant insisted on enforcing its rights whereat the plaintiff filed a legal action against the defendant being HCCC No.561 of 2007 seeking orders to restrain the defendant from enforcing its rights under the contract. Upon being served the defendant filed a defence denying liability.

It is clear that the parties entered into negotiations and the plaintiff proposed to pay the principal sum of US\$579,987.27 which sum the plaintiff admitted was due, owing and payable as at 30th June, 2007. The defendant agreed to accept the plaintiff's request on condition that the plaintiff withdraws the suit, pays the costs of the suit and meet certain conditions set out in paragraph 12 of the plaintiff's supporting affidavit to the application under my determination. The conditions were;

- The Plaintiff was to pay the Defendant a sum of USD 579,987.27 on or before 30th November 2007, being part payment of principal and interest outstanding as at 30th June 2007.
- Upon payment of the USD 579,987.27 the Defendant would postpone all principal due from 1st July 2007 all through to 30th June 2008. The new principal repayment was to effectively kick in on 1st July 2008. a new repayment schedule was to be provided.
- The Plaintiff was to continue meeting interest obligations on the facility as and when they fell due, the only exception being interest payment due on 1st September and 1st December 2007, which was to be paid at the least on 31st January 2008 and 29th February 2008 respectively.
- Any failure to make any of the payments of either principal or interest on the due dates would automatically trigger an event of default which would entitle the Defendant to recall all outstanding amounts immediately.
- The Plaintiff was further permitted to pre-pay the loan in accordance with the terms of the loan agreement. In such case the Defendant agreed to waive the pre-payment penalty.

In consideration of the said agreement the plaintiff paid to the defendant the agreed USD 579,987.27. As a consequence of the said payment the payment of the principal sum has in terms of the agreement been postponed to 30th June, 2007. The case of the plaintiff is that in spite of the said agreement, and the payments being made, following the said agreement and having settled all the outstanding interests to date, the defendant has in fragrant breach of the terms of the said agreement by a letter dated 15th April, 2008 issued a notice of default and proceeded to unlawfully demand from the plaintiff the payment of USD 2,981,009.74. It is also the case of the plaintiff that the events of default contemplated under Article 7 of the loan agreement as amended by various rescheduled agreement have not occurred so as to entitle the defendant to a notice recalling the entire principal and loan it alleges is owing to it.

It is the contention of the plaintiff that the repayment of the principal sum having been postponed to 30th June, 2008, any default in payment would only be on interest and in which case, the remedy would be for liquidated damages in respect of the amount due and unpaid being additional interest at the rate of one half per cent per month over and above the normal interest rate provided for in the loan agreement. As a result the plaintiff contends the demand is premature and without legal or contractual basis therefore, the plaintiff seeks that unless the defendant is restrained by an order of this court it will continue in its illegal acts to the prejudice and resultant irreparable damage and loss to the plaintiff.

Based on the above contention, the PLAINTIFF filed Chamber Summons application dated 12th May, 2008 seeking the following orders;

2. Pending the inter parties hearing the defendant whether by itself, its servants, agents and or employees be restrained from doing the following acts or any of them, that is to say,
 - a. Issuing demands, threats or taking any steps to prematurely invoke the events of default clause under the loan agreement between the Plaintiff and the defendant dated 18th July 2002.
 - b. Taking any precipitate action adverse to the Plaintiff otherwise than in accordance with the loan agreement dated 18th July 2002 and the agreements to reschedule the loan.
 - c. Invoking the provisions of Clause 7 of the first legal charge of the Plaintiff's fixed assets comprised in LR No.15128, I.R. No.54010 situate along Mombasa Road, by calling up and realizing the security given otherwise than by reason of an actual event of default by the Plaintiff as contemplated by the loan agreement dated 18th July 2002.
 - d. Invoking Clauses 8 and 9 of the Debenture and taking any steps whatsoever to appoint a receiver

to take over the running and control of the plaintiff or in any manner howsoever deal with the said Debenture on the total assets of the plaintiff otherwise than in accordance with the loan agreement and the agreement to reschedule the loan.

3. The defendant whether by itself, its servants, agents and or employees be restrained pending the hearing and determination of this suit from doing the following acts or any of them, that is to say,
 - a. Issuing demands, threats or taking any steps to prematurely invoke the events of default clause under the loan agreement between the Plaintiff and the defendant dated 18th July 2002.
 - b. Invoking the provisions of Clause 17 of the first legal charge of the plaintiff's fixed assets comprised in L R No.151`28, I.R. No.54010 situate along Mombasa Road, by calling up and realizing the security given otherwise than by reasons of an actual event of default by the plaintiffs a contemplated by the loan agreement dated 18th July 2002.
 - c. Invoking Clauses 8 and 9 of the Debenture and taking any steps whatsoever to appoint a receiver or in any manner howsoever deal with the said Debenture on the total assets of the plaintiff otherwise than in accordance with the loan agreement and the agreement to reschedule the loan.
 - d. Taking any precipitate action of realization of securities taken by the Defendant under the loan agreement other than in accordance with the said agreement and agreements to reschedule.
4. Costs of this application be the plaintiff's.

The defendant's reply to the application is that the plaintiff filed an earlier suit being HCC No.561 of 2007 seeking similar orders as in the present application. The parties thereafter agreed on a mode of settlement and on terms, that the suit be withdrawn on clear conditions and terms. The plaintiff in further agreement to the terms for the withdrawal of the suit paid a sum of USD 579,987.27. However, it failed to meet or fulfill other agreed repayments and/or obligations which were inter alia;

- (1) Interest in full due on 1st September, 2007 but deferred to 31st January, 2008.
- (2) Interest due on 1st December, 2007 but deferred to 28th February, 2008.
- (3) The plaintiff also failed to pay the interest due under the contract on 3rd March 2008.

And the plaintiff having committed the 5th default or the breach of contract, the defendant in a letter dated 15th April, 2008 in exercise of its contractual right served a notice of default on the plaintiff and demanded immediate payment of the principal sum and all accrued interest amounting to USD 2,981,009.74.

The issue for my determination is whether the applicant is entitled to a temporary order of injunction pending the hearing and determination of this suit. First and foremost an order of injunction is given on an exercise of the discretionary power of the court. It is important to note that this is an interlocutory application and I have to exercise some measure of caution and care in order not to trespass on the province of the Judge who will ultimately hear and determine the issues in dispute between the parties. The principles underpinning the grant of an injunction is well set out in the case of *Giella vs Cassman Brown*. The applicant is seeking an equitable remedy and as was rightly pointed by Mr. Oyatsi learned counsel for the defendant such a party has an obligation to show a good account of himself that he is not exploiting the discretionary power of the court in a manner not to prejudice the rights of opposite party. Clearly a party in pursuit of an interlocutory injunction is required to give a complete disclosure of all relevant issues, in dispute between the parties. As stated, the power of court in an application for injunction is discretionary. The law is that such a discretion has to be exercised judicially and on the basis of the law and evidence presented by the parties.

It is admitted that there is an agreement of the parties which was varied severally in order to accommodate the default committed by the plaintiff. It is clear that clause 3.07d of the agreement dated 18th July, 2002 contemplates the rescheduling of the loan. The said clause states;

“If the amortization period of the loan shall be rescheduled for any reason, the rescheduled amount shall bear interest at the rate of 1% per annum above interest rate or the rates then chargeable by EADB on long term loans, provided however the total interest chargeable shall not fall below the rate of interest provided for in section 3.02c”.

The case of the plaintiff is that the letter of 9th November 2007 amended the original loan agreement so as to confer new rights with respect to repayment. And that the postponement of the principal sum was pegged on the payment of interest. The question is what right does the plaintiff have under the varied agreement dated 9th November 2007. It is clear that clause 3.07d of the agreement dated 18th July 2002 says that in event there is a default in the repayment of interest, the remedy available to the defendant is to charge additional interest. The position taken by the defendant is that clause 3.02 of the original agreement was varied by the subsequent agreement of 9th November 2007. And that the defendant was given the right to recall all outstanding amounts immediately when there is a breach on the part of the plaintiff.

In my understanding the dispute between the parties is whether the original agreement has been varied by the latest agreement dated 9th November 2007 and in particular whether the original terms in the agreement dated 18th July 2002 were varied by the terms contained in the letter dated 9th November 2007. Of particular importance is clause No.4 of the agreement dated 9th November 2007 which states;

“Any failure to make any payments of either principal or interest on due dates will automatically trigger an even of default which shall entitle EADB to recall all outstanding amounts immediately.

It is clear that the rights of the parties as to the repayment of principal sum and interest was to be on due dates. And if the plaintiff continues to pay interest, they would be accorded the right to pay the principal sum from 1st July, 2008. On the other hand, the defendant had right to receive interest and principal on 1st July, 2008 and the right to recall the entire loan;

- (1) if a default in repayment in interest occur or
- (2) payment of the principal sum

It is also clear that on 29th February 2008 there was an admitted default on the part of the plaintiff to pay interest. It means it was the defendant’s right which was violated. And I think it is absurd for a wrongdoer to come to court to say that he wants to restrain the other party from enforcing a right that arises from his own wrongdoing.

The question that was posed by Mr. Oyatsi is whether the defendant can be held liable for the default committed by the plaintiff on 29th February 2008. The answer without being definitive is that I do not think that a party who is in default can be rewarded for his own fault. It is clear that as a result of the plaintiff’s default, the defendant wrote a letter dated 15th April 2008 which reads as follows;

DEMAND FOR PAYMENT OF USD 2,981,009.74

Refer to our telephone discussion this afternoon vide Mr. Kasozi/Dr. Seguara wherein I informed you that the Bank has recalled the total facility to M/S Curacid Kenya Limited, now amounting to USD 2,981,009.74 as at 03rd March 2008.

This follows default by Curacid Kenya in meeting its payment obligations. You requested for an explanation of the amounts due. Please find here attached a copy of the bill itemizing the amounts. Also

attached is a copy of my email dated 29th January 2008 to your Mr. Horacio Novillo and my letter of 09th November 2007.

(i) Outstanding Principal USD 2,800,000.00

· The outstanding principal sum of USD 2,800,000 has been recalled in total.

(ii) Interest in arrears USD96,461.12

· Interest in arrears of USD96,461.12 represents quarterly interest for September – November 2007 (USD82,387.67) which, as per our letter dated 09th November 2007, you had agreed to pay on 28th February 2008 but Curacid Kenya defaulted in payment thereof. To this amount, we have added USD10,000, the amount by which Curacid Kenya underpaid in January 2008. Penalties accrued on the amounts due have also been added.

(iii) Interest due USD80,615.89

Interest due of USD80,615.89 represents interest due on 01st March 2008 which, as per paragraph 3 of my letter of 09th November 2007, it was agreed that Curacid Kenya shall continue to meet interest obligations on the facility as and when they fall due. Again, Curacid Kenya has defaulted in paying this amount.

In view of the provisions of the Loan Agreement and the express provisions of paragraph 5 of my letter dated 09th November 2007, EADB has decided to recall the entire loan”.

In my mind the rights and obligations of the parties were founded on their written agreement of 18th July 2002. And as a result of the plaintiff’s default, the parties severally varied the terms of the earlier agreement thereby introducing and incorporating new terms and conditions in their relationship. One such agreement which varied the terms of earlier agreement is the agreement dated 9th November 2007. In my opinion that agreement was complimenting and/or cementing the terms and conditions of the earlier agreement between the parties. No doubt various mutual agreements were reached because of the default committed by the plaintiff. And in order to accommodate the interest of the plaintiff, the defendant bent backwards several times. The position in the various agreements were all intended to express and show the correct position in the relationship between the parties. If there was a default in the last agreement, the plaintiff cannot be allowed to resort to the terms of the earlier agreement in order to defeat the rights of the parties which was subsequently varied and modified in the agreement dated 9th November 2007. I do not think it is right for the plaintiff to derive on advantage and thereafter resort to denial.

The plaintiff acknowledges that at the time, the letter dated 15th April 2008 was written, it was in default of the terms and conditions of the agreement dated 9th November, 2007. In my humble view, a party cannot be allowed to assert a right based on his own default or wrongdoing in an attempt to defeat an agreement that expressly define the rights and obligations of the parties. That is what the plaintiff intends to do. The question is whether it can succeed. It is clear beyond doubt that interest was payable on the first day of March, June, September and December of each year as per the agreement of 18th July 2002. However, the agreement of 9th November, 2007 clearly stipulated that the plaintiff was to meet interest obligations on the facility when they fell due, the only exception being interest payment due on 1st of September and December, 2007 was to be paid at the latest on 31st January 2008 and 29th February 2008 respectively. It is clear that the plaintiff was to pay the interests due on 1st September 2007 on or before 31st January 2008. It was also required to pay the interest due on 1st December 2007 on or before 29th February 2008. That was not done. From the evidence on record, the plaintiff committed a fundamental default on the terms of the agreement dated 9th November 2007. Clearly no right was violated by the defendant. And therefore the defendant cannot be held liable for the wrongdoing of the plaintiff. It is admitted that on 29th February, 2008 there was a default by the plaintiff to pay interest due and by such

default, the rights of the defendant was violated. It is therefore my decision that the plaintiff is not entitled to the orders sought because there is no infringement of its right by the defendant.

In my humble view, a party who has a right cannot and will not be prevented from that right being exercised except on the basis that the right was being exercised oppressively. As admitted, the plaintiff was accommodated more than four times and it is on the 5th default, that the defendant intends to exercise its rights under the contract. In my opinion the conduct of the defendant is a clear manifestation of a party who wants to accommodate another party who is in default and who wants to keep a relationship for as long as it is possible. On the other hand the conduct of the plaintiff is a demonstration of a party who is inclined to persist on his own default but nevertheless expects the other party and the court to give him a leeway for his persistent wrongdoings. I do not think such a conduct meets the expectation of the eyes of equity. To me there exists no right which has been apparently been infringed or were about to be infringed by the defendant which will call for an answer or intervention of this court.

It is therefore my decision the application for injunction is unmeritorious and is dismissed with costs to the defendant.

Dated, signed and delivered at Nairobi this 25th day of June, 2008.

M. A. WARSAME

JUDGE