



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL DIVISION
Civil Case 607 of 2004

CHUKA PROPERTIES LIMITED.....PLAINTIFF

VERSUS

EURO BANK (IN LIQUIDATION) THRO' DEPOSIT

PROTECTION FUND BOARD-LIQUIDATOR.....DEFENDANT

RULING

By an application brought by way of a Chamber Summons dated 2.11.2004 the Plaintiff company seeks a temporary injunction against the Defendant restraining it from selling, disposing of, offering for sale, or in any other manner interfering with the Plaintiff's Land Reference Number 209/12277 situate at Upper Hill Nairobi until this matter is heard and determined, and thereafter a mandatory injunction compelling the Defendant to deliver up to the Plaintiff the title to LR No. 209/12277 (the suit property) fully discharged. The Plaintiff also claimed the costs of the application.

The application is supported by the Affidavit of John Chuchu Muchai, a director of the Plaintiff, sworn on 2.11.2004, and the grounds set out in the face of the application. The application was further supported by the Supporting Affidavit of the said John Chuchu Muchai sworn on 25.01.2005 and filed on 26.01.2005.

The application was opposed and the Defendant had a Replying Affidavit of M.A. Mohammed the Defendant's Liquidation Agent, sworn on 23.10.2004 and filed on 25.11.2004.

When this application was urged before me on 11.04.2005, the Liquidation Agent was, pursuant to the Plaintiff's application dated and filed in Court on 8.03.2005 by the Plaintiff's Counsel, subjected to cross-examination on his Replying Affidavit sworn on 25.11.2005 as already stated above.

The liquidation agent was examined by Mr. Njuguna, learned Counsel for the Plaintiff/Applicant as to his educational background, his past and current experience in banking, how a limited liability company opens an account in a bank, how a company is ordinarily managed, the requirements for opening an account by a company, whether he knows the Directors of the Plaintiff company, and whether an account had been opened by the Plaintiff with the Defendant Bank.

To these questions, the Liquidation Agent told the Court that he was a graduate of the University of Nairobi and holds a MBA of the same University. He joined the Central Bank of Kenya and had worked and acquired valuable experience in various Departments of the Bank where he had worked since joining the Bank in 1998. He told the Court on oath that he is an experienced banker specialised in statutory management and liquidation of banks. He had in that capacity been Liquidation Agent for Euro Bank Ltd, Reliance Bank and Middle Africa Ltd, and had while working with the Deposit Protection Fund Bank, managed 12 other institutions.

This deponent confirmed on oath that he knew the matter at hand from the records of the Bank concerning the Account of the Plaintiff Company. He told the Court that although he had never he himself opened an account for a customer (he is a banker of bankers), he was generally aware of the requirements for opening an account in a bank by a limited company, there would for instance be an opening card, a resolution of the Board of Directors of the Plaintiff company authorising the opening of the account, the production of the constitutive documents of the company, that is its Memorandum and Articles of Association, specimen signatures and nowadays, photographs of the persons who are signatories to the Account.

This deponent confirmed to the Court that he had come to know the director of the Plaintiff Company, a Mr. John Chuchu Muchai, and one Medrine W. Muchai. He confirmed that a letter dated 18.08.1998 was issued and signed by one Simon Njau Hehu who was not a director of the Plaintiff Company, using the postal address of P. O. Box 68121, Nairobi which was the same address used as per the letter of offer dated 22.07.1998 by the Defendant Bank (In Liquidation), to the Plaintiff Company for the advance of Ksh. 12 million,

This Liquidation Agent further confirmed that although the letter was made on 22.07.1998 the account at Exhibit "MAM 6" showed a debit balance of Ksh. 10,037,619.20 as at 13.05.1998 and that these were the accounts they (as Deposit Protection Fund Board) inherited, and so far the said Fund Board was concerned, they can vouch for these accounts as being correct, and could not agree with the suggestion by Mr. Njuguna, that there were no accounts opened by the Plaintiff with the Defendant Bank.

I think the evidence in cross-examination of the Liquidation Agent may be summarised by saying that the Plaintiff owed the Defendant Bank (In Liquidation) substantial sums of money, and that was clearly shown in the records of the Bank which the Deposit Protection Fund Board inherited when the Defendant Bank was placed under statutory management and liquidation by the Central Bank of Kenya.

The second leg or aspect of the Plaintiff's application was that although the Plaintiff's suit property was charged to secure the sum of Ksh. 12 million, the Plaintiff never actually received such sum, and that there was therefore failure of consideration for the charge, and that being the case, the onus to prove otherwise shifted to the Defendant in terms of Section 112 of the Evidence Act, (Cap. 80, Laws of Kenya). There was no proof that the Plaintiff ever opened an account with the Defendant Bank Ltd.

In the absence of any account opening forms, in the absence of any cheques being produced by the Defendant which were issued by the Plaintiff, there is no explanation that the Plaintiff opened an account with the Defendant, except the bare statement in the Liquidation Agent's Affidavit in paragraph 5(a) that an A/C No. 100656-019 was opened but that there were no supporting documents for opening such an account. So far as Mr. John Chuchu Muchai's the Plaintiff (the director's) Supplementary Affidavit sworn on 25.01.2005, the whole account was a forgery, a money laundering activity by Simon Njau Hehu, and the Defendant Bank's staff.

The Plaintiff sets out particulars of alleged fraud which have not been specifically traversed, and are deemed to be admitted under Order VI, rule 9 (3) of the Civil Procedure Rules.

Counsel also sought the particulars of the debt pursuant to the statutory notice dated 22.07.2003, per a "**Without prejudice**" letter dated 3.06.2003 but that they had received no reply,

For all these reasons, Counsel for the Plaintiff concluded that the Plaintiff had established a prima facie case for the grant of an injunction in accordance with the principles of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358 and Kamau Muchuha vs. The Ripples Limited C.A. 186/1992** (unreported) to which cases I shall revert to after considering the arguments by Mr. Bundotich, learned Counsel for the Defendant/Respondent.

Counsel submitted that the only prayer which the Court may consider is prayer No. 3 as Prayer No. 4 for a mandatory injunction is in the nature of a final order and cannot be granted at this stage. I agree with Counsel on that submission. The issue however remains whether the Plaintiff has established a prima

facie case for the grant for a temporary injunction pursuant to prayer No. 3.

The Plaintiff's case was that the Plaintiff did not operate an account with the Defendant Bank, and the charge cannot be enforced for lack of consideration.

To this twin issues, the Defendant's Liquidation Agent had responded that the Plaintiff was at all the time aware that it operated an account with the Defendant, and cannot now be heard to say that they did not open an account with the Defendant. The Plaintiff has stated that Simon Njau Hehu was not a director of the Plaintiff Company but has not denied that he was an employee of the Plaintiff with specific responsibilities to deal with the Defendant Bank or banking generally. The Plaintiff has not denied that he was served with a demand letter dated 25.05.1999 for a sum of Ksh. 22,563,886.15 plus interest @ 39% p.a.

The Defendant also relied upon the Plaintiff's Statement of Account attached to the Replying Affidavit of the Liquidation Agent as Exhibit "MAM 6". Those statements of Account clearly show that the Plaintiff had in the cause of conducting operations of its Account with the Defendant Bank issued cheques at various times well in excess of Ksh. 15,284,047/= as of 15.08.1998 and also as early as 14.05.1998 for Shs. 10,037,619.20.

The Plaintiff is thus well aware of the issue of those cheques and cannot rely upon the provisions of Section 112 of the Evidence Act to shift that responsibility and onus on the Defendant, and say that the issue and payment of cheques was a matter peculiarly within the knowledge of the Defendant. If the Defendant had held this view all along, it could have sought inspection of the Defendant's Entries into Bank Books in terms of S. 179(1) of the Evidence Act. Otherwise that account or Statement of Entry into the Bank Books is properly admissible in evidence in terms of Section 176 of the Evidence Act. S. 176 of the Evidence Act provides that a copy of any entry in a Banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded.

The Defendant's Counsel also accused the Plaintiff of being guilty of inordinate delay. The Charge in issue was executed on 12.08.1998 and was registered on 20.08.1998. If there was no consideration there is no explanation as to why it had taken 6 years to move the Court. The Plaintiff only came to Court when the Defendant's Liquidation Agent moved to sell the suit property. There is no letter or communication from the Plaintiff to the Defendant Bank to complain either of lack of consideration or other challenges as to the validity of the Charge.

Annexures "MAM 3" and "MAM 5" annexed to the Replying Affidavit of the Liquidation Agent, are copies of correspondence by the Defendant's then Ag. Managing Director demanding Shs. 22,563,886.15 from the Plaintiff and further follow-up letters dated 31.08.1999, (demanding Shs. 24,751,507.05, and enquiring about the expected receipt of Shs. 26 million), the Defendant's demand letter of 26.10.1999 in which the Plaintiff's S. N. Hehu (the same Simon Njau Hehu), indicating expected receipt of the sum of Ksh. 26 million from the Government's Ministry of Lands and Settlement, and Public Works and Housing. All this correspondence leads to one conclusion, that the Plaintiff had a vibrant Bank/Customer relationship with the Defendant Bank in respect of the Plaintiff's Account No. 10065019. The Plaintiff cannot therefore say that they were unaware.

Bundotich, learned Counsel for the Defendant therefore urged the Court to find that the Plaintiff had not established a prima facie case for the grant of the equitable relief of injunction.

Those were the arguments by the rival parties. I will now consider the authorities and proceed to render my opinion on the matter.

In the case of ROSELINE NJERU MACHARIA vs. DAIMA BANK LTD and SAMUEL KIOKO MWANGI (Milimani Commercial Courts H.C.C.C. No. 692 of 1999) Mbaluto J. granted a temporary injunction restraining the sale of a suit property while auditors and accountants reconciled the accounts where the Plaintiff had alleged illegal entries into her account. The issue in that case also concerned

contractual interest against the Plaintiff's account.

That case is however different from the present case. In this case, the Plaintiff alleges that there was not even an account opened.

The Plaintiff's also cited many other authorities which are no doubt correct in their own respective contexts, but are not of much assistance in this instance. For the Plaintiff to establish a prima facie case under the **Giella vs. Cassman Brown Co. Ltd [1973] EA 358**, (principles), the Plaintiff must show either that the Charge instrument was in some material respect not in conformity with the law under which it was created, that no requisite statutory notice was given by the Defendant Bank, or by the Auctioneers under the Auctioneers Act 1996 (No. 5 of 1996), or the Auctioneers Rules 1997 (L.N. No. 120 of 1997).

The Plaintiff has not demonstrated in its Supporting Affidavit or in the submission of learned Counsel, why in the first instance it executed the Charge over the suit property. Men and women of business who deal in millions of shillings do not part or give their property without proper consideration. For the Plaintiff to feign and pretend that it did not open an account with the Defendant Bank to repudiate its liability under the charge is not proof of **prima facie** case for the grant of an injunction. The sums at stake are substantial.

It is correct that the Defendant is under liquidation. There is however no evidence from the Plaintiff that if the property were sold, and the Plaintiff were later successful in its suit, that the Defendant would be unable to pay, or that the Plaintiff could not be compensated in damages. For any actions of the Liquidation Agent are fully backed by the full faith and credit of the Deposit **Protection Fund Board**, and the Liquidation Agent will not act recklessly in the realisation and distribution of any assets under the liquidation of the Defendant.

The Plaintiff has established no plausible reason for denying the Defendant the right of exercising its statutory power which had clearly arisen by reason of the Plaintiff's default. There is no offer by the Plaintiff to redeem any part of the secured debt. I cannot see any redeeming reason in denying the Defendant Bank or its Liquidation Agent the right to sell the charged property.

For these reasons, the Plaintiff's application dated 2nd November 2004 fails and is dismissed with costs.

Dated and delivered at Nairobi this 25th day of May 2005.

ANYARA EMUKULE

JUDGE