



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

Civil Case 553 of 2005

KIBUWA LEASING & MANAGEMENT LIMITEDPLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA LTD.DEFENDANT

RULING

By its amended Chamber Summons of the 7.10.2005 the Applicant seeks the following relief:-

3. THAT this Honourable Court be pleased to grant the Plaintiff/Applicant an interim injunction restraining the Defendant by itself, its agents, servants, employees, assigns, nominees or otherwise howsoever from demanding illegal and uncontractual interest and charges from the Plaintiff in respect of the Plaintiff's loan account held with the Defendant, and further from interfering with and or debiting illegal and uncontractual interest and charges to the Plaintiff's Loan Account held with the defendant pending the hearing and determination of this application.

3A. THAT this Honourable Court be pleased to grant the Plaintiff/Applicant an interim injunction restraining the Defendant by itself, its agents, servants, employees, assigns, successors, nominees or otherwise howsoever from alienating, selling, disposing, realising and or in any way dealing with the Government Bonds offered as security by the Plaintiff to the Defendant by way of a lien; and set out at page 6 of the Letter of Offer between the parties and dated 28th April 2005 pending the hearing and determination of this application.

4. THAT this Honourable Court be pleased to grant the Plaintiff/Applicant an interim injunction restraining the Defendant by itself, its agents, servants, employees, assigns, nominees or otherwise howsoever from demanding illegal and uncontractual interest and charges from the Plaintiff in respect of the Plaintiff's loan account held with the Defendant, and further from interfering with and or debiting illegal and uncontractual interest and charges to the Plaintiff's Loan Account held with the defendant pending the hearing and determination of this suit.

4A. THAT this Honourable Court be pleased to grant the Plaintiff/Applicant an interim injunction restraining the Defendant by itself, its agents, servants, employees, assigns, successors, nominees or otherwise howsoever from alienating, selling, disposing, realising and or in any way dealing with the Government Bonds offered as security by the Plaintiff to the Defendant by way of lien; as set out at page 6 of the Letter of Offer between the parties and dated 28th April 2005 pending the hearing and determination of this suit.

5. THAT Summary Judgement for specific performance be granted to the Plaintiff against the

Defendant in respect of the written contract between the parties.”

No arguments were adduced in respect of the 5th prayer.

The application is grounded on the reasons set out therein and is supported by the affidavit of John Muriuki Kibuchi of the 17.10.2005.

The application is brought under the provisions of Order 39 Rule 1,,2,,2A and 9 and other provisions.

The parties entered into an agreement whereby by loan facilities were granted by the Respondent to the Applicant pursuant to a letter of offer dated 28.4.2005, annexed as JMK1 to the supporting affidavit.

The Applicant seeks two remedies. Firstly that the Respondent be restrained from charging interest in excess of that stipulated in the letter of offer and secondly that the Respondent be restrained from realizing the securities held by it in respect of the loan.

The second relief is dependant on or whether or not the Respondent has rightly increased its interest rate.

This is an interlocutory application and in order to succeed the Applicant must show that it has a prima facie case with a probability of success, that damages would not be an adequate remedy and if in doubt the matter to be determined on a balance of convenience.

Of necessity I am bound to consider the terms of the letter of offer to see if there is a prima facie case. I am not, however, at this stage entitled to make a definitive determination of the meaning of the contract between the parties. That must await the outcome of the hearing of the suit.

Mr. Kibuchi for the Applicant submitted that the condition of the terms of the letter of offer is that the appropriate rate of interest to be charged is that under Clause 4.1 of the letter of offer which under the heading “Pricing”, “Interest rate” states:-

“Interest rate on the term loan will be the Lender’s prevailing base rate, currently standing at 14% per annum, minus a margin of 6% p.a., that is, 8% per annum.”

The Respondent, however, relies on Clause 4.3 which under the heading “Default Interest” states:-

“The Bank reserves the right to vary interest rate applicable on the loan facility from time to time, depending on the money market conditions. Any defaulted loan instalment payments or overdrawn balance consequent upon debiting monthly instalments or any other charges to your current account to be opened with the Lender will be charged default interest currently standing at 20% p. a. or such other rate as the Lender may specify from time to time.”

And Clause 8.5 which states:-

“The facility is granted without prejudice to the Lender’s customary rights to at all times determine the nature extent and duration thereof. The facility is also subject to the Lender’s General Terms and conditions a copy of which the Borrower is to sign and return for the Lender’s retention at the time of opening the current account at the Lender’s Loita Street Branch, Nairobi.”

On the 15th July, 2005 the Respondent wrote to the Applicant a letter in the following terms:-

“RE: REVIEW OF INTEREST RATE

As you are aware, there has been a significant increase in the cost of funds in the money market since March 2004 when your loan facility was approved. The pricing of your loan took into account the floor rate on Treasury bills which was at an all time low of below 1%. Today the rate on Treasury bills is close to 9% while that on bonds with longer term maturities is well above 11% p.a.

Arising from the significant and drastic change in interest rate regime, the bank has been compelled to review the interest rate applicable on your term loan. Effective 1st August, the rate applicable will be adjusted from the bank's base rate minus 6% to base rate minus 2%. Our base rate currently stands at 14% p.a.

You will appreciate that even with this adjustment the bank has maintained the price to below our prime rate, which is an exceptional gesture on our part.

We shall upon adjustment of the interest rate send you fresh repayment schedules.

Kindly acknowledge receipt of this letter."

The applicant's submission is that there is a firm agreement that the rate of interest to be changed on the Term loan is the lender's prevailing base rate minus a margin of 6%. It was on this basis that the original schedule of repayment was calculated.

The Applicant says the letter of 15.7.2005 altered this set rate by reducing the margin of 6% to 2% but that as stated in the letter the base rate still continued at 14%.

In respect of Clause 4.3 the Applicant submitted this was under the heading "**Default interest**" and did not in any way affect the power of Clause 4.1 and related to interest in the event of default only and that the words "*The bank reserves the right to vary interest rate applicable on this loan facility from time to time, depending on the money market condition*" were in respect of default interest only.

It is clear that there is a conflict between these two clauses which can only be resolved on a construction of the clauses at the hearing.

With regard to Clause 8.5 the applicant referred to Clause 5 of the General terms and condition annexed to the supporting affidavit. Clause 5 is governed, so Mr. KIibuchi for the Applicant submitted, by the words "*unless otherwise agreed in writing*". In this case he says the parties have otherwise agreed in writing namely in clause 4(1) of the Letter of Offer.

On the other hand, Mr. Kiru for the Respondent submitted that under Clause 4(3) of the letter of offer and Clause 5 of the General Terms and condition the Respondent could vary the rate of interest contrary to that stated in clause 4(1) set out above.

In so far as damages being an alternative remedy is concerned this in my view is not a relevant matter for consideration as in the event that the interest rate was as stated by the Applicant it would be inequitable to load it with an obligation which it says it did not undertake. The matter can be dealt with if the injunction is granted by the Applicant giving an undertaking as to damages.

I am of the view that prima facie the Applicant has a right to expect interest to be determined in pursuance of the provision of Clause 4.1 which only anticipates an interest increase if the base rate alters.

So far as balance of convenience is concerned this falls in favour of the applicant as it has planned its repayments in accordance with the schedule subject only to an increase in the base rate.

In the result I think this is a case where it is just to grant the relief sought and I therefore grant prayer 3 3A, 4 and 4A of the application subject to the Applicant filing within 14 days from today an undertaking as to damages.

Costs will be costs in the cause.

Dated and Delivered at Nairobi this 10th day of November, 2005.

P. J. RANSLEY

JUDGE