Mbaluto t/a Superdrive Safaris v SBM Bank Kenya Limited (Formerly Chase Bank Limited) & another (Commercial Case E272 of 2022) [2023] KEHC 1887 (KLR) (Commercial and Tax) (6 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E272 OF 2022

DAS MAJANJA, J

MARCH 6, 2023

BETWEEN

WILLIAM MUTISYA MBALUTO T/A SUPERDRIVE SAFARIS ..... PLAINTIFF

AND

SBM BANK KENYA LIMITED (FORMERLY CHASE BANK LIMITED) ..... 1ST DEFENDANT

DALALI TRADERS AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. What is before the court for determination is the Notice of Motion dated 20th July 2022 filed by the Plaintiff invoking, inter alia, under Order 40 Rule 1 of the Civil Procedure Rules ("the Rules") where he seeks the following orders:

    1. Spent*
    2. Spent*
    3. THAT this Honorable Court be pleased to grant an interlocutory Injunction restraining the Respondents by themselves, agents, servants, employees and or anybody from selling and / or disposing of the applicant's property NAIROBI/BLOCK 109/417/537, Nairobi County by way of public auction slated for 6 September 2022 along Kijabe Street, Nairobi herein pending the hearing and determination of this suit
    4. THAT the 1st Respondent by either of them, their agents, servants and directors, and any of them in singular and/or jointly, to render accounts

or to produce to the Court the entire statement of accounts, contractual documents, bank Charges/further Charges Instruments, any other loan documents relating to the applicant which will be considered as evidence of this Honorable Court within fourteen (14) days of the orders of this Court.

5. THAT in the alternative, the Honorable Court do appoint an independent audit firm with key duties of managing, protecting, preserving and furnishing this Court with an audited account of all sums received from the applicant by the 1st respondent, and in overlooking the prescribed accounting and / or ensuring necessary safeguards/security and proper accounts are rendered and furnish the final report to the Honorable Court at the cost of the 1 Respondent.

6. THAT cost of this application be provided for.

2. The application is supported by the Plaintiff's affidavits sworn on 20th July 2022 and 2nd November 2022. It is opposed by the 1st Defendant ("the Bank") through the replying affidavit of its Debt Recovery Officer, Dalmas Ngui, sworn on 14th September 2022. The parties have supplemented their arguments and positions by filing written submissions.

3. Since the parties take contrasting positions as to the background leading up to the filing of this suit and application, I will set out the each of the parties' cases for a better comprehension of the facts giving rise to the dispute. However, what is undisputed is that the Plaintiff is the registered owner of the property known as NAIROBI/BLOCK 109/417/537 ("the suit property") and a customer of the Bank. That he took out various loans with the Bank between 2011 and 2016 which facilities were secured by the suit property.

4. On 8th April 2022, the Bank notified the Plaintiff that he owed it Kshs. 145,105,561.67 in form of the outstanding loan with interest and penalties and on 30th June 2022, the 2nd Defendant, acting on instructions from the Bank advertised the suit property for sale. It is this impending action by the Bank that prompted the Plaintiff to file this suit together with the application to forestall the sale of the suit property and for accounts.

The Application

5. The Plaintiff claims that he only borrowed Kshs. 16,000,000.00 from the Bank periodically between the year 2012 to 2016 until the Bank was placed under receivership. He states that over the period, he paid an aggregate of over Kshs. 32,000,000.00 to the Bank but was shocked when he was notified by the Bank in its letter dated 8th April 2022 that he owed it Kshs. 145,105,561.67.

6. The Plaintiff states that he immediately consulted his auditors who have since made a loan summary report which points out glaring errors on the Bank's statement of account as the same consists of recurring loans/unknown booked loans amounting to over Kshs.100 Million which the Bank never advanced to him. The Plaintiff insists that the said purported arrears of over Kshs. 145 Million is unaccounted for, exaggerated and that the Bank ought to adduce all the evidence of accounts before the Court and that the Bank, while trading in the name of Chase Bank Limited had issues before collapsing and this is when the Plaintiff's account was subjected to its current status. That there was a period within which Chase Bank operations stopped and that means that his account could not have continued running.

7. The Plaintiff urges the court to call for all the accounts and documents from the Bank and that unless the orders sought in the application are granted, the Plaintiff will suffer loss and damage.

The Bank's Response

8. The Bank opposes the application on the ground that the Plaintiff has not made out a case for the grant of the orders sought and in particular the conditions for the grant of an interlocutory injunction set out in Giella v Cassman Brown [1973] EA 348.

9. It points out the application is based on misrepresentation of facts. It avers that as at 8th March 2016, the Plaintiff had a consolidated loan with the Bank amounting to Kshs. 125,999,614.30, an amount that was in arrears at that time. Due to this default, the Plaintiff approached the Bank to restructure his loan and this led to the loan being restructured to Kshs. 28,000,000.00 as per the letter of offer dated 8th March 2016 and that the same was to be secured by a Further Legal charge over the suit property. That the restructuring of Kshs. 28,000,000.00 was conditional on the Plaintiff fulfilling certain terms and conditions failure to which the loan amount would revert to Kshs. 125,999,614.30. The Plaintiff was to accept the terms of the Letter of Offer dated 8th March 2016, provide the suit property as security and execute a further charge over the suit property which had an existing charge of Kshs. 2,000,000.00.

10. The Bank states that the Plaintiff did not meet the conditions precedent to necessitate the restructuring of the loan amount to Kshs. 28,000,000.00 necessitating the Bank to revert to the previous loan amount of Kshs. 125,999,614.30 which was continuing to accrue interest at the contractual rate.

11. The Bank avers that the Plaintiff had 3 overdrawn Overdraft facilities and 1 term loan which were all in arrears and all the 4 accounts were attracting interest at the contractual rate of 11.5% per annum. That as at 21st June, 2021, the 4 loan accounts had accumulated to an outstanding loan amount of Kshs. 141, 213,171.00 and failure by the Plaintiff to settle his account with the Bank, the Bank commenced realization of its security over the suit property and issued a statutory notice dated 21st June, 2021 informing the Plaintiff of its intentions to exercise its remedies over the suit property as provided for in section 90 of the *Land Act*, 2012. That after expiry of this period, the Plaintiff had still not settled his account or made any attempts to settle the same, a fact which prompted the Bank to issue a notice dated 8th April, 2022 being the Notice to sell the suit property within 40 days from the date of service of the notice as a result of an outstanding sum of Kshs. 145,105,561.67 and that the 2nd Defendant was duly instructed to act on the said sale. The Bank therefore states that the Plaintiff does not dispute the fact that the statutory power of sale has arisen following the issuance of the statutory notices and as such the Bank should be allowed to complete this process.

The Plaintiff's rejoinder

12. In response to the Bank, the Plaintiff points out that the Bank's deposition does not in any way justify how the alleged outstanding loan of Kshs. 145 Million arose. He reiterates the he only borrowed Kshs. 16,000,000.00 and that his auditors established from his statements of accounts that the sum borrowed of Kshs. 16 Million was repaid in full together with interest and penalties to the Bank. The Plaintiff rejects the assertion that he approached the Bank to restructure the loan of Kshs. 125 Million as a misrepresentation of facts and avers that it is the Bank that compelled him to accept the reconciliation. He states that through a letter dated 25th June 2015 from the Interest Rates Advisory Centre (''IRAC'') and addressed to him, the facilities he had with the Bank elicited the following features:

    a. Loan repayment schedules for all the loans issued were not availed by the Bank and that those availed did not correspond to the interest charged on the respective loans.

    b. The Kshs. 9 million loan was booked thrice on 10th June 2010,15th July 2010 and 1st September2010.

c. The Bank delayed in the conversion of the 10 million overdraft to a term loan and continued to debit default interest on the current account during the period between August 2011 and October 2011.

d. Despite several letters to the Bank requesting for a restructure on the outstanding facilities, the Bank delayed and continued to increase by debiting the Plaintiff's account with interest at the default rate.

e. There was a purported credit of Kshs. 38 Million presumed to be a loan but no letter of offer was availed.

13. The Plaintiff contends that the above led him to lodge a dispute with TransUnion Company, a credit reference bureau, to delist his name from the default associated with the said debt and that the said bureau responded through a letter dated 25th April 2017 addressed to the Plaintiff stating that they had been advised by the Bank to amend his status since the information by the Bank to the listing company was inaccurate. That following the aforesaid incidences, the Plaintiff states that he was called by the Bank and coerced to sign a new offer letter dated 8th March 2016 for Kshs. 28,000,000.00 after the Bank unilaterally agreed to write of an unexplained loan amount of Kshs. 98,000,000.00. The Plaintiff however states that he declined to execute to accept the restructured loan as he had paid off his genuine loans.

Analysis and Determination

14. As stated, the Plaintiff seeks an injunction to forestall the impending sale of the suit property and an order for accounts. In the alternative, it seeks an order that the court appoints an independent audit firm to carry out proper accounts of the loans and furnishes a report to the court.

15. The parties are in concert that for a court to issue an injunction order, an applicant must meet the conditions for grant of an interlocutory injunction set out in Giella v Cassman Brown (Supra). It must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. In Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR the Court of Appeal reiterated the three conditions are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions. In Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR, the Court of Appeal explained that a prima facie case is one, "which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter."

16. A prima facie case with a probability of success is grounded on the what the party has pleaded in the plaint. In his plaint, the Plaintiff states that the purported arrears of over Kshs. 145 Million is unaccounted for and exaggerated and he accuses the Bank of malpractices in the manner his loan accounts were mismanaged by the bank's predecessor, Chase Bank.

17. To support the arrears of Kshs. 145,105,561.67, the Bank has annexed the Conditional Offer of banking facility dated 8th March 2016, the statutory notices dated 21st June 2021, 8th April 2022 and 30th June 2022 and the Statements of Accounts marked SBM 6 –SBM 9. The Plaintiff assails the Letter of Offer dated 8th March 2016 by stating that he was coerced to sign the said letter but that

he did not execute the offer letter and refused to sign the letter of acceptance for the restructured loan after a further thought since he claims he had fully paid off his genuine loans. In respect of the Statements of Accounts, the Plaintiff averred that a summary from his auditors revealed "glaring errors" consisting of recurring loan amounts amounting to Kshs. 100 million wherein the Bank never gave out the purported loans in the Plaintiff's favour.

18. I have gone through the said Letter of Offer and note that the Plaintiff has signed off against all the pages therein including the "Memorandum of Acceptance" where he accepts "...the banking facility subject to the terms and conditions stated herein above". Clauses 2 and 3 of the of the Letter of Offer provide as follows:

> 2. Existing liability: The borrower hereby acknowledges that they are indebted to the Bank in the principal sum of Kshs. 125,999,614.30 (Kenya Shillings One Hundred and Twenty Five Million Nine Hundred and Ninety Nine Thousand Six Hundred and Fourteen Cents Thirty Only) as at the 8th March, 2016 as detailed below:-
>
> **Type of Facility Amount Outstanding**
>
> Short Term Loan Kshs. 64,990,177.62 Dr
>
> Overdraft (001****6002) Kshs. 53,234,333.75 Dr
>
> Current Account(001****9002) Kshs. 7,127,563.93 Dr
>
> E Current Account (001****9005) Kshs. 647,2539.00 Dr
>
> Total Kshs.125,999,614.30 Dr
>
> 3. Purpose: The facility will be used to restructure all overdrawn existing liabilities.

19. The Letter of Offer further provided that the Bank would only make available the facility if the Plaintiff fulfils some conditions set out in Clause 8 thereof including accepting the terms of the Letter of Offer and executing a further charge in favour of the Bank over the suit property. Clause 9 went on to state that upon execution of the letter of offer and fulfilling the conditions precedent, the Bank would then write-off the overdrawn amount in the current accounts amounting to Kshs. 98,080,809.55.

20. In as much as the Plaintiff claims that he was coerced into signing the Letter of Offer, he did not disclose to the court that the Bank had offered to the restructure the existing liabilities. The restructure formed the basis of the Bank's claim for the amount of over Kshs. 32,000,000.00 which the Plaintiff claims to have paid. In any case, I do not see any evidence of coercion that would otherwise form the basis of a prima facie case with a probability of success. What is before the court, at least on a prima facie basis is that there is a Letter of Offer executed and accepted by the Plaintiff where the Plaintiff acknowledges that he is indebted to the Bank in the principal sum of Kshs. 125,999,614.30. There is also no rebuttal from the Plaintiff that he failed to fulfil the conditions precedent and thus the Bank was entitled to recover the principal sum of Kshs. 125,999,614.30 as opposed to writing off the sum of Kshs. 98,080,809.55. Therefore, at least going by the Letter of Offer dated 8th March 2016, the Plaintiff acknowledged being indebted to the Bank in the principal sum of Kshs. 125,999,614.30

21. What the Plaintiff disputes is the amount he owed to the Bank by relying on his auditors. The auditors have an account summary of one of the loans issued and conclude that the loan balance as per a loan of Kshs. 5,040,000.00 granted on 1st July 2011 was supposed to be Kshs. 3,455,600.01 and that the Kshs. 21,922,358.35 debit interest ought to have been suspended from December 2012 to pave way for

reconciliation. The Plaintiff also faults a loan of Kshs. 9,000,000.00 that was booked three times in the statement between 10th June 2010 and resulted in a double charge of the interest for the same loan. The Plaintiff has also pointed out amounts in the statement where it claims that the same were charged as loans but that he never applied for the same and that there were no supporting documentation for such loans. The Plaintiff produced the IRAC report dated 25th June 2015 where it opined that there were issues about the reconciliation of the Plaintiff's accounts. He also annexed letters dated 3rd June 2015 and 30th June 2015 where he raises questions about the debits and reconciliation of the loan accounts. However, in a letter 19th April 2022, the Plaintiff states that he has no objection towards, "... settling the actual loan outstanding..." but then laments about the amount of time, ten years, that it has taken to reconcile the actual loan that is outstanding.

22. While I agree with the Plaintiff that he has raised valid questions as to the reconciliation of his loan accounts and the amount of indebtedness, I cannot shy away from the express admission of debt by the Plaintiff and the fact that the Plaintiff is bound by the terms of the Letter of Offer he signed on 8th March 2016. As Kimondo J., held in Five Forty Aviation Ltd v Lufthansa Technik Aero Alzey Gmbh ML HCCC No. 253 of 2011 [2011] eKLR, "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." The Plaintiff is bound by the terms of the Letter of Offer where he acknowledged his indebtedness to the Bank.

23. Our courts have always held that a dispute on the amount due either to the charge; either as principal or interest does not form the basis for granting an injunction restraining the charge from exercising it statutory power of sale unless it is easily discernible from the terms of the charge and law that usurious or illegal interest had been charged (see Charles Alex Njoroge v National Bank of Kenya Ltd & another ML HCCC No. 173 of 2014 [2015] eKLR). In Civil Servants Housing Co. Ltd and Another v Lavuna and Others [1995] LLR 366 (CAK), the Court of Appeal held that, "...A court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage..."

24. The Plaintiff does not challenge the fact the Bank's statutory power of sale has crystallised following the issuance of the statutory notice under section 90 of the *Land Act*. I therefore hold that the Plaintiff has failed to demonstrate a prima facie case with a probability of success and the inquiry on whether he is entitled to an injunction ends at this point in line with the dicta in Nguruman Limited v Jane Bonde Nielsen and 2 Others (Supra).

25. Turning to the issue of accounts, the Bank and the Plaintiff have set out their own version of the accounts. The Bank has provided the Statements of Account in its responding deposition hence I do not see the need to grant Prayer No. 4 of the Application. I would however emphasise that the Bank is under an obligation to provide any information including updated statements to its customer. As regards, Prayer No. 5, I would only point out the Bank's statements of account enjoy a presumption of validity under section 176 of the *Evidence Act* (Chapter 80 of the Laws of Kenya). Whether and to what extent the expert opinions relied on by the Plaintiff are true and correct is a matter for trial hence imposing on the parties a mode of trial without basis at this stage would be improper. I however hold that this would be a proper case for reference to mediation.

DISPOSITION

26. For the reasons I have set out I am constrained to dismiss the Plaintiff's application dated 20th July 2022 with costs to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Orenge instructed by Daniel Orenge and Company Advocates for the Plaintiff.

Mr Kazungu instructed by Okubasu, Munene and Kazungu Advocates LLP for the Defendants.