Ali v Chase Bank (K) Ltd (Under Receivership) & another (Civil Suit 38 of 2017) [2023] KEHC 17927 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 38 OF 2017

DO CHEPKWONY, J

MAY 16, 2023

BETWEEN

NASRA ALI ..... PLAINTIFF

AND

CHASE BANK (K) LTD (UNDER RECEIVERSHIP) ..... 1ST DEFENDANT

ROBERT WAWERU MAINA T/A ANTIQUE AUCTIONS AGENCIES ..... 2ND DEFENDANT

JUDGMENT

1. Vide a Plaint dated April 4, 2017, the Plaintiff sued the Defendants seeking Judgment against them for:-
   a. A permanent injunction to restrain them, their servants and or agents from selling property known as Plot No 13134/1/MN CR 39926.
   b. An order directing the 1st Defendant to recalculate the interest and actual outstanding debt of the loan.
   c. Costs of the suit.
2. The genesis of the claim as pleaded in the Plaint is that the Plaintiff co-owns the suit property with one Humphrey Gatimu Njuguna and they jointly offered the property as collateral to secure a loan in the sum of Kshs 5,000,000/= advanced by the 1st Defendant to Brit travel & Car Hire Limited. A charge dated February 11, 2011 was therefore created over the suit property. Further to that, the Plaintiff issued a personal guarantee for Kshs 5,000,000/= in favour of the 1st Defendant with respect to the subject loan.
3. However, the Plaintiff avers that the loan ballooned to Kshs 177,096,642.41, an amount which in her view is exaggerated, and the 1st Defendant in allegedly exercising the statutory power of sale instructed the 2nd Defendant to sell the property known as Plot No 13134/1/MN/CR 39926 (herein referred to as

'suit property') by way of public auction for recovery of the outstanding amounts. Consequently, the 2nd Defendant issued Notifications for sale and Redemption Notice to Humphrey Gatimu Njuguna but for unknown reasons failed to issue the same to the Plaintiff notwithstanding that the Plaintiff is a co-registered owner of the subject property.

4. The Plaintiff avers that she has never been served with notification of the outstanding debt and in her view, the amount claimed in the notices for sale are not only exaggerated but also in contravention of the *Banking Act*, hence the intended sale ought to be stopped and the orders sought issued.

5. The 1st Defendant filed a statement of defence dated November 29, 2018 and denied the averments made in the Plaint in toto. It however clarified that by a letter of offer dated October 8, 2010, the 1st Defendant granted loan facility to the Directors of Brit Travel and Car Hire Limited (hereinafter "the Company") for Kshs 5,000,000/= repayable over a period of thirty-six (36) months and the first instalment was to fall due 30 days after the disbursement of the loan. To secure the loan, a legal charge was created over the suit property in addition to personal guarantee and indemnity issued by Directors of the Company namely Humphrey Gatimu Njuguna and Peter Ndirangu Gatimu for Kshs 5,000,000/= as well as personal guarantee and indemnity issued by the Plaintiff herein for similar amount.

6. It was further Pleaded that around the same period, the Director of the Company requested and were granted an overdraft facility for Kshs 34,507,430.00. This amount was also secured by a charge over the suit property. According to the 1st Defendant, a salient term on the facility and charge created was that interest would accrue based on the banks lending rate of eighteen per centum (18%) and a default penalty rate of 39.96% would apply in the event the Company defaults in making the payments.

7. However, the Company defaulted in the repayment and refused to honour the terms of the charge and offer letter. Thus, according to the 1st Defendant it is within its rights to exercise the statutory power of sale over the suit property. It is the 1st Defendant's contention that as at June 7, 2018, the Plaintiff's account had been overdrawn to a tune of Kshs 74,370,255/= in addition to the initial outstanding loan of Kshs 6,073,857.00. For those reasons, the 1st Defendant craved for the suit to be dismissed with costs.

8. At an interlocutory stage, this Court granted a temporary injunction restraining the sale of the suit property on account of failure by the 1st Respondent to proof that the Notices for Sale were properly served upon the borrower and the uncertainty on what loan amount was outstanding.

9. When the matter was certified ready for hearing, each party called one witness in support of its case. The Plaintiff testified on her own behalf on April 20, 2021. She adopted her witness statement dated April 4, 2017 as her evidence in-chief. The said witness statement replicates the averments in the Plaint as reproduced above, except to add that she was only aware of the first loan of Kshs 5,000,000/= but was not aware of the second loan of Kshs 34,507,430.00. Further, that although he was aware that the company was to repay the loan in instalments of Kshs 100,000/= she never followed up on to establish whether the repayment was made in full.

10. On cross-examination, the Plaintiff confirmed that she had signed the charge and given her consent to offer the suit property as collateral for the loan advanced. She maintained that the Notices were sent via an address owned by Humphrey Gatimu and she never received any of those Notices or letters sent through the same address. She however told court that she learnt of the Redemption Notice because it was fixed on the wall of the suit property.

11. Martha Kanyige testified on behalf of the Defendant. She is engaged as a Debt Recovery Officer at SBM Bank but before then, she was working for Chase Bank. She adopted the statement dated May 10, 2021 as her evidence in-chief and produced the Defendants bundle of documents as the Defendants'

Exhibits. She testified that *vide* an offer letter dated October 8, 2010, the Plaintiff was allocated a facility of Kshs 5,000,000/= and was later accorded an overdraft of Kshs 34,507,430.00. The facility was secured by a charge dated December 11, 2011 but the Plaintiff and the Company have failed to service the loan up to date. The Deponent further confirmed that the bank issued Notices on January 29, 2016 and May 30, 2016 respectively and a Notice of Sale dated November 25, 2016 which were served by way of registered posts.

12. When cross-examined, DW1 stated that the notices were served through the address availed in the charge document and having signed the offer letter together with the charge document, the Plaintiff gave the bank authority to charge the suit property. On re-examination, DW1 confirmed that the outstanding amount was Kshs 80,444,113.00 as of January 25, 2016.

13. Parties were thereafter directed to file respective submissions in support of their respective positions. The Plaintiff filed a set of submissions dated July 1, 2021 while those of the 1st Defendant are dated October 6, 2021. The submissions replicate the summary of the parties respective case as reproduced above, and will not reproduce the same here.

Analysis and Determination

14. Having laid out the parties' respective cases as above, the starting point is not disputed by any of the parties. The offer letter dated October 8, 2010 and the charge document dated February 11, 2011 are not disputed by either party and neither has the Plaintiff disputed having given/issued her authority to the 1st Defendant bank *vide* a letter dated May 15, 2010 to charge the suit property. It is also not in dispute that the loan is still in arrears. What appears to be in dispute is whether the Plaintiff consented to have a charge over the suit property for the overdraft amount of Kshs 34,507,430.00 requested by the Directors of Brit Travel and Car Hire Limited.

15. Consequently, I have read through the terms of the offer letter which culminated into the charge document dated February 11, 2011 and find it purposely expressed the invitation to offer a term loan to the tune of Kshs 5,000,000/= to Brit Travel and Car Hire Limited which loan was to be payable over a period of Thirty-six months. The offer was accepted by Directors of the said Company by counter-signing on the offer letter. However, at no point does the offer letter mention the overdraft facility of Kshs 34,507,430.00. The Plaintiff does not dispute that she issued a bank guarantee and indemnity to the tune of Kshs 5,000,000/= to secure the loan facility.

16. On the other hand, at recital (B) of the Charge document dated February 11, 2011, it is stated that:-

> " The Bank has at the request of the Chargor agreed not to call in or to sue for or require the immediate repayment of any existing indebtedness due to it from the charger or others for whom the charger is a surety and has agreed to grant to Brit Travel and Car Hire Company Limited .... Financial accommodation by way of loan, time credit, banking facilities, overdraft, advances and other financial facilities from time to time to an aggregate maximum principal amount (exclusive of interest and other charges, costs and expenses as hereinafter provided) upto Kenya Shillings five Million (Kshs 5,000,000) or the equivalent in whatever currency denominated (hereinafter referred as the maximum principal amount) or such lower limit as may for the time being and from time to time be fixed by the bank."

17. Clause 4 of the Charge Document provides on "Secured Obligations" and reads as follows:-

> " The total monies for which these presents constitute shall be the aggregate of the maxim principal amount together with interest as aforesaid and such other costs, liabilities,

taxes, expenses and charges and other amounts payable by the Chargor and/or the Borrower pursuant to the provisions of this charge (hereinafter referred to as the "secured obligations")

18. In this Court's humble opinion that the recital or preamble of any contract are introductory statements whose purpose is to set out the summary of the parties' intentions, scope of contract and nature of contract and they aid in the interpretation of the contract. From the above Clause, it therefore follows that the Charge dated February 11, 2011 was only intended to secure the term loan to the maximum principal amount of Kshs 5,000,000/= together with interest and costs thereof.

19. In any event, the scope of the agreement provided that the financial accommodation either by way of loan, bank facilities, overdraft, advances and other financial facilities would not exceed the aggregate sum of Kshs 5,000,000/=. That is the extent to which the Plaintiff as guarantor to the term loan granted the 1st Defendant to charge the suit property and any alteration to award facilities exceeding the agreed principal amount would only be legal if made in consultation of all the parties. This is the view expressed by the court in the case of *Abraham K Kiptanui vs Delphis Bank Ltd & Another*, Nairobi (Milimani Commercial Courts) HCCC No 1864 of 1999, where it was stated that:-

> " The true rule is that if there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and that if he had not consented to the alteration, although in cases where it is without inquiry evidence that the alteration is insubstantial, in that it cannot be otherwise than beneficial to the surety, the surety may not be discharged, yet that if it is not self-evident that the alteration is insubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration...A guarantor will be discharged unless the guarantor's liability has been preserved with words in the guarantee which cover the conduct relied on by the guarantor to discharge him."

20. In this case, it is evident that the Plaintiff was not consulted for the alleged overdraft of Kshs 34,507,430.00 which in any event exceeds the aggregate maximum principal amount envisaged in the charge. It therefore goes without saying that the alleged overdraft exceeds the scope of the charge document, and it cannot be said to have been secured under the Charge document dated February 11, 2011. Nonetheless, in the defence, the 1st Defendant has not stated the precise time and or date when the overdraft facility was advanced to Directors of Brit Travel and Car Hire Ltd or at least attached the offer letter containing the terms governing the overdraft facility. As such, this Court is not persuaded that the overdraft facility is within the headroom created by the charge document dated February 11, 2011 so as to be recoverable against the Plaintiff or under the said Charge.

21. The question which then follows is whether based on the above findings a permanent injunction can be issued restraining the Defendants from selling the suit property. The principles that underpin the grant of mandatory injunction were well laid out in the Court of Appeal case of *Kenya Breweries Ltd vs Washington Okeyo* (2002) EA 109 wherein the superior court while citing with approval Vol. 24 *Halsbury Laws of England* 4th Edition Paragraph 948 stated follows:-

> " A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant

attempts to steal a match on the Plaintiff, a Mandatory Injunction will be granted on an Interlocutory application".

22. From the above citation, it follows that a permanent injunction is one which fully determines the rights of the parties before the court and is normally meant to perpetually restrain the commission of an act by a party in order for its rights to be protected. This court appreciates that a permanent injunction can be issued by invoking the provisions under Sections 1A, 3 and 3A of the *Civil Procedure Code*, 2010 where the court is satisfied that the right of a party has been infringed, violated and/or threatened.

23. From the facts herein, it is not disputed that the 1st Defendant advanced the term loan of Kshs 5,000,000/= to Brit Travel and Car Hire Limited for which the Plaintiff issued a guarantee and indemnity to secure its payment. The suit property was offered as a collateral for the term loan and the Plaintiff accordingly gave consent thereto. It is however not clear whether the term loan has fully been paid so as to discharge the suit property and the Plaintiff of her obligations. Since the bank's rights to payment of the term loan is protected by the charge over the suit property in addition to the guarantee and indemnity issued in its favour, a permanent injunction can only issue once it is shown that the Plaintiff has fully discharged her obligation towards the payment of the term loan.

24. In the circumstances, the Plaintiff has not demonstrated that her case is clear to meet the threshold for being granted an order of permanent injunction as laid down in law. Thus, the Plaintiff is required to discharge her obligations towards payment of the term loan first before approaching the court for orders of permanent injunction. However, to aid the Plaintiff in achieving that, this court is persuaded that there is the need to re-calculate the loan amount in arrears since the outstanding amount of the term loan is unclear.

Conclusion

25. In view of the foregoing discussion and having established that it is not clear whether the term loan has been fully repaid, it is this court's conclusion that a permanent injunction cannot be issued since the same can only be granted in the clearest of cases and upon the Plaintiff establishing that she has fully discharged her obligations towards repayment of the loan.

26. However, the 1st Defendant is at liberty to exercise its Statutory Power of Sale over the suit property only for recovery of term loan as opposed to the overdraft facilities, save for instances where the bank is pursuing the sale with respect to shares and rights held by Humphrey Gatimu Njuguna. If the bank opts to exercise its rights, the same shall be subject to issuance of fresh Notices to the Plaintiff herein. But before doing this, the 1st Defendant is also obligated to recalculate the outstanding debt in the term loan taking into consideration the instalments already paid for the benefit of the Plaintiff to enable her discharge her obligations.

27. For avoidance of doubt, the following orders issue:-

    a. The 1st Defendant is not entitled to the recovery of the overdraft facility of Kshs 34,507,430.00 from the Plaintiff under the Charge dated February 11, 2011.

    b. The prayer for a permanent injunction restraining the 1st and 2nd Defendants, their servants and or agents from selling the suit property known as Plot No 13134/1/MN/Cr No 39926 be and is hereby declined.

    c. The 1st Defendant to recalculate the outstanding debt in terms of the term loan under the Charge dated February 11, 2011, taking into consideration the instalments already paid

thereto, for filing and service upon the Plaintiff within Thirty (30) days from the date of this ruling.

d. The 1st Defendant be and is hereby at liberty to exercise its Statutory Power of Sale over the suit property limited to the recovery of the term loan and subject to issuance of fresh Notices to the Plaintiff.

e. Each party to bear its own costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 16TH DAY OF MAY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Martin