Karrymart Limited & 2 others v Co-operative Bank of Kenya (Commercial Case E058 of 2023) [2023] KEHC 22027 (KLR) (Commercial and Tax) (5 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22027 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E058 OF 2023

DAS MAJANJA, J

SEPTEMBER 5, 2023

BETWEEN

KARRYMART LIMITED ..... 1ST PLAINTIFF

LENANA HOSPITAL LIMITED ..... 2ND PLAINTIFF

GEORGE KARIITHI ..... 3RD PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA ..... DEFENDANT

RULING

1. At the material time, the 1st plaintiff was the operator of a supermarket business within the Nairobi Central Business District.On or about November 15, 2011, the defendant("the bank") advanced it Kshs 40 million as startup capital for the businessand secured by *inter alia* a legal charge dated January 23, 2012 over LR Nos Ngong/Ngong/48155, 48156, 48157, 48161, 48162, 48163, 48166, 48167, 48168, 48169, 48170 and 48171 all registered in the name of the 3rd plaintiff ("the Ngong properties"), a legal charge dated February 8, 2012 over LR No Naivasha/Mwichiringiri Block 2/150 in the name of the 3rd plaintiff ("the Naivasha property"), a legal charge dated March 20, 2012 and further legal charge dated April 24, 2015 over LR No Limuru Township/219 in the name of the 2nd plaintiff ("the Limuru Property").

2. On July 13, 2012 the bank agreed to reschedule the loan and on January 7, 2015 it agreed to consolidate and restructure it into an SME term loan after the 1st plaintiff fell into arrears. Between February 19, 2015 and September 28, 2016 the bank sanctioned an overdraft facility for Kshs 10,000,000.00 and also further restructured the existing facilities. By a plaint dated February 15, 2023 and amended on April 20, 2023, the plaintiffs filed suit claiming that the Bank has been debiting money from the 1st

plaintiff's current account to the loan account in an opaque manner as no statement has been given to the 1st plaintiff's account for the transactions to date.

3. The plaintiffs further claimed that they presented a proposal which was mutually agreed to jointly offer for sale the Ngong Properties by way of sale by private treaty, and through the bank's "property hub" agency, a unit within the bank, which agreement subsists as at the time of filing suit. The plaintiffs claim that the bank sold one of the Ngong Properties for Kshs 4,050,000.00 but to date it has not credited the purchase price to the loan account. That between September 7, 2021 and January 5, 2023 some of the Ngong Properties have been sold by private treaty and the proceeds deposited with the bank and thatthe parties have still about 6 of the properties up for sale at Kshs 5.4 million each therefore Kshs 32.4 million was expected to be remitted to the bank by June 30, 2023.

4. The plaintiffs aver that the bank, through Galant Valuers Limited, commissioned a valuation for the Naivasha Property two years ago which returned a market valuation of Kshs 45 million. The 1st plaintiff contends that thisproperty is of greatest sentimental value to its directors as both his parents are buried there. That a valuation of the Limuru Property also returned a market value of Kshs 54 million and it was apparently mutually agreed that there be subdivisions of this property for joint resales under a private treaty and that the 1st plaintiff spent more than Kshs 600,000 on survey fees. However, the plaintiffs aver that the Limuru Property's current valuation is Kshs 70 million.

5. As they had already submitted a payment plan, the plaintiffs state that they weresurprised to see an email from the bank dated January 3, 2023 requesting them to submit a payment plan or proposal on how to liquidate the debt and at the same time informing them that it had handed over the Limuru and Naivasha Properties to an auctioneer.

6. The plaintiffs doubt that they owe the bank Kshs 105,300,200.00 indicated in the auctioneers' notification of sale and as such demandan account of the money loaned vis a vis money paid from the proceeds of sales, money debited from the 1st plaintiff's current account and interest charged which has not been forthcoming from the bank. The plaintiffs aver that the demand of Kshs 105,300,200.00 is contrary to the in-duplum rule under section 44 of the *Banking Act* (chapter 488 of the Laws of Kenya), is exploitative, usurious, oppressive and unlawful.

7. The plaintiffs accuse the bank of lack of proper accounting of the sale proceeds and or money debited from the 1st plaintiff's current account despite repeated requests and protest from the 1st plaintiff's directors, opening several accounts in the 1st plaintiff's name without consent and which are difficult to comprehend, offering the plaintiffs' properties for sale grossly undervalued and charging usurious and non-contracted, unexplained, interest rates, charges and expenses. The plaintiffs claim thatthe bank purported to restructure the first lot of disbursement of Kshs 50,000,000 to Kshs 67,000,000 through misrepresentation, coercion, threats and undue influence to the 3rd plaintiff and without justification or accountability and pray that the same be opened, impeached, accounted and vitiated and contested. That there is no statement of account justifying the first lot of disbursement of Kshs 50,000,000.00 to Kshs 67,000,000.00 or the entire demanded amount up to Kshs 67,000,000 or the entire demanded amount of Kshs 105,300,200.00, the same being borne out of guesswork and picked from the blues.

8. The plaintiffs reiterate that the bank has not accounted for sale of 6 Ngong Properties which have yielded about Kshs 24,000,000.00 and that the remaining 6 Ngong Properties are being offered at a price of Kshs 5.4 million each will yield a total of Kshs 32,400,000.00 which is sufficient to cover the principal sum and all they are asking for is accountability to court and to them. The plaintiffs further assert that both the Limuru and Naivasha Properties are grossly undervalued and the valuations given by the auctioneers are out of date for more than 2 years with the sole intent of disposing them at a loss

to their detriment. That the properties already given to the bank to be sold under private treaty are enough to dispose of the loan save for the usurious, unlawful and demands in contravention of the law.

9. In their reliefs, the plaintiffs pray that the accounts be reconciled taking into account the sale proceeds from the sale of the properties and that the accounts be audited by the Interest Rates Advisory Center (IRAC). They pray for a declaration that the demand by the bank being more than 100% of the principal loan contravenes the *Banking Act* and is null and void and an order that the bank discharge the Limuru and Naivasha Properties and a permanent injunction be issued against interfering with them.

10. Based on the facts I have outlined above, plaintiffs have filed the notice of motion dated February 15, 2023 under, *inter alia*, order 40 rules 1, 2, 3, 8 and 10 of the *Civil Procedure Rules* seeking an order of injunction stopping the sale by public auction or private treaty of the Limuru Property and other properties belonging to the plaintiffs and that the bank issues a statement of account to justify the sum of Kshs 105,300,200.00 and in the alternative upon the furnishing of such a comprehensive statement and proceeds of sale of the plaintiffs' properties, the same be subjected to IRAC for independent analysis and a report be made as soon as practicable. The application is supported by the facts on its face and the affidavits by the 3rd plaintiff sworn on February 15, 2023 and April 19, 2023 respectively.

11. The bank opposes the application through the replying affidavit of itsMSME Remedial Officer - Credit Remedial Division, Joel Okindo, sworn on March 23, 2023. According to the bank, the plaintiffs defaulted on both the term loan and the overdraft facility and at the plaintiffs' request, the outstanding loan of Kshs 66,504,734.83, was restructured as one facility on the terms of the restructure offer letter dated September 28, 2016 and that the 1st plaintiff signed a corporate guarantee of the same date.

12. The bank avers that going by the contractual figures in the facility and restructure letters, it has not violated section 44 of the *Banking Act* unless it demands more than Kshs 133,009,469.66. The Bank contends that it was demanding Kshs 105,300,200.00 due and owing as at November 7, 2022 which amount rose to Kshs 107,302,332.46 as at February 16, 2023 and continues to accrue interest until payment in full.

13. The bank's avers that in accordance with standard practice for all accounts at the bank, the 1st plaintiff receives its statements of account by email on a monthly basis. That the 1st plaintiff has had ample time to crosscheck the statements of account and dispute any entry but it has not raised any dispute. Further, the 1st plaintiff has not informed the bank that it has not received the monthly statements or at any rate requested for them. In any event the bank has annexed statements for loan account numbers 016C8*01, 016C8*03, 016C8*04, 016C8*05 and 016C8****06. From the foregoing, the bank states that the 1st plaintiff has failed to demonstrate any violation of the law regarding the amount demanded by the bank. The bank therefore submits that at any rate, a dispute on the amount due is not a ground for granting an interlocutory injunction.

14. The bank disputes that some four parcels excised from the Ngong Property have been sold through private treaty by the bank but have not been accounted for. The bank states that the plaintiffs contradict themselves in one of the sale of those properties by first stating that it was sold on October 26, 2021 for Kshs 3.5 million and then go ahead to state that the same was also sold on January 5, 2023 for Kshs 4.6 million. That in any case, the plaintiffs does not present any documentary evidence of a sale of any of the said Ngong Properties nor do they present any evidence that these purchasers deposited the funds with the bank. That any other pending sales on the Ngong Properties must adhere to the bank's financing procedures and that even if one of them is to go through, this would be a drop in the ocean given the outstanding loan.

15. The bank also contends that the agency agreement entered into between the parties lapsed on February 16, 2021 and cannot be acted upon unless the parties agree to renew it. The bank avers that it is at liberty to realize any of the securities available to it and it is not for the plaintiffs to tell the bank which one to realize first. That if the 1st plaintiff insists that only the Ngong Properties should be sold, it could have done so and presented the funds to the Bank and if those funds fully repay the debt, the Bank would have no power to sell the Naivasha Property or Limuru Property. That even going by the 1st plaintiff's calculations, the 12 Ngong Properties would only fetch a maximum of Kshs 48 million against a loan of Kshs 107,302,332.46.

16. The bank avers that the professional valuer it instructed to value the Limuru Property returned the forced sale value of Kshs 40,500,000.00 as at the time of the last valuation and that this is what will guide the bank at the time of sale. That the plaintiff's valuation is premised on a valuation report which, on the face, admits that it did not obtain various relevant details as it was also not for purposes of establishing the forced sale value and it is therefore unsafe and unwise to even consider it. That at any rate, the fact that the plaintiff's valuer assigns a different value from that assigned by the bank's valuer, is not a ground for granting an injunction as the variance can always be remedied by an award of damages. That even if the court finds that there is some basis to complain about the valuation, the remedy is in ordering a fresh valuation to be conducted within a limited period but that the sale however should not be postponed indefinitely by an injunction.

17. The bank contends that the plaintiffs have repeatedly expressed their desire to sell the Limuru Property and the Ngong Properties to repay the loan and it is therefore unreasonable for the plaintiffs to say the sale would lead to irreparable injury to them.Additionally, the Naivasha Property was given as security with full knowledge of the consequences of default and it is irrelevant that the plaintiffs may have some sentimental attachment to it. The bank points out that the initial facility was repayable within 6 years, however, 12 years later the plaintiff is yet to repay the facility and has instead resorted to litigation to unfairly delay the bank's exercise of its statutory power of sale.

Analysis and Determination

18. The parties have filed written submissions in support of their respective positions. Although the bank has raised several technical issues, I propose to deal with the substance of the application regarding whether or not I should grant the injunction.

19. The main issues for determination are whether the plaintiffs have made out a case for grant of an order of injunctive relief so that the court can forestall the sale of the plaintiffs' properties, whether the bank should issue a statement of account justifying the outstanding debt of Kshs 105,300,200.00 and whether the same should be subjected to IRAC for independent analysis and a report made as soon as practicable.

20. The three conditions for the granting of an interlocutory injunction were set out in *Giella v Cassman Brown & Co Ltd* [1973] EA 358. First, an applicant must show a *prima facie* case with a probability of success. Second, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Third, if the court is in doubt, it will decide an application on the balance of convenience. The Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 others* Nrb CA civil appeal No 77 of 2012 [2014] eKLR added that the three conditions must be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. As to what constitutes

a *prima facie* case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 others* [2003] eKLR explained that:

> A *prima facie* case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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 as to call for an explanation or rebuttal from the latter.

21. The gist of the plaintiffs' compliant can be inferred from its pleadings, more so the plaint. First, it avers that that the demanded sum of Kshs 105,300,200.00 is not comprehensible and goes against the in-duplum rule, second, that the bank has been charging usurious and non-contracted, unexplained interest rates, charges and expenses, third, that the properties have been undervalued, fourth that the bank has not accounted for the sale proceeds of some of the charged properties and fifth, that the restructure of the facilities to a sum of Kshs 67,000,000 was done through misrepresentation, coercion, threats and undue influence to the 3rd plaintiff and without justification or accountability.

22. I have considered that grounds put forth by the plaintiffs and juxtaposed the same with the bank's reply and the material on record and I find that the same do not raise any *prima facie* case in the plaintiffs' favour that entitle them to an injunction. I say so for various reasons as follows.

23. The plaintiffs have outrightly admitted that they are indebted to the bank. What they appear to be disputing is the level of indebtedness. It is clear that the 1st plaintiff's facility was restructured into a single facility. The fact of the restructure is an implicit admission of indebtedness thus whether the amount claimed is contrary to the in duplum rule or otherwise comprises of unauthorised interest and penalties only goes to the amount due. That issue will also be settled at the trial. It is now trite that the court cannot issue an injunction for the reason only that an applicant disputes the level of its indebtedness. This position is cemented by the various decisions of our courts including the decision of the Court of Appeal in *Civil Servants Housing Co Ltd and another v Lavuna and others* [1995] LLR 366 (CAK) where it was 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..." (see also *Khan and another v Habib Bank AG Zurich and another* [2022] KEHC 130 (KLR)).

24. The plaintiffs' claim that the restructure was arrived at by misrepresentation and coercion by the bank is not supported by any evidence. I am aware that the court at this stage is not required to conduct a mini trial but must nevertheless determine whether there is a *prima facie* case (see *Nguruman Limited v Jane Bonde Nielsen and 2 others* (supra)). The restructure was consummated way back in 2016. Until this suit was filed, the plaintiff did not raise any issue regarding the propriety of the restructure. The subsequent engagements between the plaintiffs and the bank do not suggest anything other than parties dealing freely and at arm's length.

25. A substantial part of the plaintiffs' case concerns the valuation of the suit properties by the bank. Section 97 of the *Land Act*, 2012 imposes on a chargee, in this case the Bank, a duty of care to the chargor, in this case the plaintiffs, to obtain the best price reasonably obtainable at the time of sale and in that regard, it is required to ensure a forced sale valuation is obtained. The valuation itself is a matter of professional opinion and a difference between two valuations, of itself cannot be a basis to warrant an injunction to restrain the chargee from exercising its statutory power of sale. In any case, the loss suffered by the chargor as a result of the undervalue represented by the difference in valuation is a finite value which represents damages that the plaintiff has not shown that the bank is incapable of paying. (see *Omega Foundation v Chase Bank of Kenya* Ksm HCCC No 69 of 2018 [2018] eKLR).

26. The plaintiffs' prayer for the statements of accounts is also spent as the bank has provided them. The plaintiffs appear to be challenging some of the entries therein which once again, goes to the level of indebtedness, which is a matter for trial. The plaintiffs' prayer for an independent audit of the said statements by IRAC cannot also be granted as the bank has already discharged its burden by producing the statement which under section 176 of the *Evidence Act* (chapter 80 of the Laws of Kenya) 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, transactions and accounts therein recorded." The burden is now on the plaintiffs and not the bank, to upset this presumption by pointing out which entries in the accounts are mistaken, erroneous or otherwise fraudulent. This can be done by the plaintiff presenting an expert report if they so wish at the trial.

27. As I have already stated, I find and hold that the plaintiffs have failed to demonstrate a *prima facie* case with a probability of success. As long as the 1st plaintiff is indebted, the bank is entitled to choose which security or combination of securities it should realise (see *Crested Acres Investments Limited v National Bank of Kenya* [2017] eKLR). The plaintiffs are indebted to the bank and their complaints, if successful, can only be remedied by an award of damages.

Disposition

28. The plaintiffs' application dated February 15, 2023 is dismissed with costs to the defendant. The interim orders in place are hereby discharged.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2023.

D. S. MAJANJA

JUDGE