



REPUBLIC OF KENYA



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**East African Cables PLC v Equity Bank (Kenya) Limited (Commercial Case E505 of 2023)
[2024] KEHC 14009 (KLR) (Commercial and Tax) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E505 OF 2023
JWW MONG'ARE, J
NOVEMBER 11, 2024**

BETWEEN

EAST AFRICAN CABLES PLC PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED DEFENDANT

RULING

1. The Plaintiff is the duly registered owner of the properties known as L.R. No. 209/4235, L.R. No. 209/8176, L.R. No. 209/6982/1 and L.R. No. 209/6982/2 (“the suit properties”). By a facility letter dated 21st January 2019, the Defendant (“the Bank”) advanced a facility of Kshs.1,700,000,000.00/= to the Plaintiff and its associate company known as East African Cables (Tanzania) Limited. The facility was secured by inter alia an All-Asset Debenture Charge of Kshs.1,700,000,000.00/= over the current and future assets of the Plaintiff to be stamped and registered in favour of the Bank; A Legal Charge of Kshs.965,475,000.00/= over properties L.R. No. 209/8176 and L.R. No. 209/6982/1; A Legal Charge over property L.R. No. 209/4235 for Kshs.422,625,000.00/=; A Legal Charge over property L.R. No. 209/6982/2 for Kshs.213,103,500.00/= and; A Legal Charge over property L.R. No. 3734/126 for Kshs.86,250,000.00/=.
2. Over time, the Plaintiff’s account fell into arrears leading the Bank to make a demand for payment of outstanding sums being Kshs.1,960,304,231.92/=. In response, the Plaintiff, through its letter dated 14th June 2023 sought various indulgences for consideration by the Bank in respect of the outstanding arrears but the same was rejected as the Bank proceeded to exercise its right under section 534(1) of the *Insolvency Act* (Chapter 53 of the Laws of Kenya) and Clause 6 of the Debenture to appoint joint administrators over the Plaintiff. This prompted the Plaintiff to file a suit; Milimani HCCOMM No. E277 of 2023; East African Cables PLC -vs- Equity Bank (Kenya) Limited, George Weru and Muniu



Thoiti wherein it applied and obtained interim orders to stop the joint administrators from taking control over the company pending the hearing and determination of its injunction application.

3. In any event, the Bank proceeded to serve the Plaintiff with three statutory notices dated 3rd July 2023 notifying the Plaintiff of its intention to sell the suit properties. This action precipitated the filing of the present suit by the Plaintiff together with the Notice of Motion dated 17th October 2023 made under inter alia Order 40 Rule 1, Order 20 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) and section 103(1) (a), 3 & 4 of the Land Act (Chapter 280 of the Laws of Kenya) seeking to restrain the Defendants from dealing in any way with the suit properties and/or invoking any of its rights pursuant to section 96 of the Land Act and under the Charges pending hearing and determination of the suit. It also seeks to suspend the statutory notices issued.
4. The application is supported by the facts on its face and the affidavits of the Plaintiff's director, Paul Muigai sworn on 17th October 2023, 17th November 2023, 28th June 2024 and 9th July 2024. It is opposed by the Bank through Grounds of Opposition dated 7th November 2023 and the affidavits of its Manager, Legal Services, Kariuki King'ori sworn on 7th November 2023 and 9th October 2024. The application has been canvassed by way of written submissions which are on record and I will make relevant references to the same later on in my analysis and determination.

The Application

5. The Plaintiff's case is that the statutory notices were issued in total disregard of the Orders issued in HCCOMM No. E277 of 2023 maintaining the existing "status quo" between the parties as at the date immediately prior to the appointment of the Administrators on 16th June 2023. That the said statutory notices lack a basis to commence the exercise of the Bank's statutory power of sale on the suit properties and that the debt is substantially disputed. The Plaintiff avers that parties have been in extensive negotiations with a view to reconciling the Plaintiff's account and determining the actual outstanding amount with the last correspondence being the letter dated 12th June 2023 from the Bank to the Plaintiff's holding company Transcentury PLC requesting for more information from the Plaintiff. As such, the Plaintiff contends that the statutory notices are premature, unprocedural and in bad faith.
6. The Plaintiff contends that it has been liquidating the outstanding debt and has made all the efforts to negotiate and agree on a workable programme/time-table with the Defendant in light of the hard economic situation in the country, but the Bank has rejected the Plaintiff's numerous proposals without any justifiable cause whatsoever and now intends to completely cripple the Plaintiff's operations and entire business investment of many years by selling the suit properties. It states that that the actions of the impending sale of the suit properties by the Bank will not only be an illegality and procedural irregularity but also smack of malafides in view of the said court orders which are still in full force and effect. That it is manifestly clear that the Defendant is determined to unfairly, capriciously and maliciously clog and completely extinguish the Plaintiff's equity of redemption, which is immoral, unjust and contrary to law hence the need for intervention of the Court.
7. The Plaintiff states that the suit properties are unique in character and in peculiar locations and fully developed and currently valued at a total sum of over Kshs.3,000,000,000.00/= and of great commercial value to the Plaintiff and it is impossible to replace the same in the event of a sale and the Plaintiff would not be adequately compensated by way of damages. It states that the Bank has refused, declined and/or neglected to rescind the statutory notices despite demand by the Plaintiff.



The Bank's Reply

8. The Bank depones that the administration proceedings are separate and distinct from these proceedings and the Bank's rights under the charges offered by the Plaintiff to secure the debt are not the subject matter of HCCOMM No. E277 of 2023. That as the Plaintiff was still in default, the Bank exercised its rights under the charges and issued statutory notices under section 90 of the Land Act and that the notices were issued by the Bank and not by the joint administrators. The Bank adds that the suspension of the administration in HCCOMM No. E277 of 2023 only stops the Bank from exercising its rights under the debenture but does not stop it from exercising its rights under the charges. The Bank claims that the Plaintiff has not responded to the statutory notices issued on 3rd July 2023 indicating how it will be repaying the debt and that the 90 days under the notice have now lapsed. The Bank believes that it is entitled to continue with the process of exercising its statutory power of sale by issuing the statutory notice under section 96 of the Land Act and that the Plaintiff is still in default and the amount outstanding continues to accrue interest.
9. The Bank contends that there is no imminent threat of sale as it is yet to issue the 40- day notice to sell under the Land Act, the 45-day redemption notice required under the Auctioneers Rules and the 14-day advertisement for sale by public auction in a national newspaper. That the Plaintiff still has the opportunity to exercise its equity of redemption if it wishes to do so. The Bank claims that the Plaintiff has admitted that it is indebted to the Bank in the letter dated 14th June 2023 and that the Plaintiff has made a general statement that it is now disputing the debt but has not given any details of its reasons for disputing the debt.
10. The Bank states that it is not true that the Plaintiff has paid Kshs. 617 million as interest and that the interest that has accrued on the Plaintiff's facility so far is Kshs.1,025,498,791.00/= and the Plaintiff has only paid Kshs.587,276,840.08/= on account of interest. The Bank states that the Plaintiff is still indebted to the Bank in the sum of Kshs.1,999,458,755.92/= as at 3rd November 2023 and this sum continues to accrue interest. It further states that it is not true that the parties have been engaging with a view to reconciling the Plaintiff's account as alleged. That while there have been discussions between the parties regarding proposals on paying the debt, the Plaintiff has not made any acceptable proposal to the Bank and that the Bank's letter of 12th June 2023 to the Plaintiff's parent company, Transcentury PLC, did not request for any further information with respect to the Plaintiff's debt. The Bank states that this letter was in relation to when funds raised by Transcentury PLC in a rights issue would be accessible to pay the debt owed by Transcentury PLC. As such the Bank contends that it is entitled to realize the securities owed to it. For these reasons, the Bank urges the court to dismiss the application.

Analysis and Determination

11. I have gone through the parties' pleadings and submissions including the Supplementary affidavit and the response thereto. I note that the Plaintiff is seeking injunctive orders and as such, it ought to satisfy the conditions set out in the case of *Giella Vs. Cassman Brown & Co., Ltd.* [1973] E.A. 358 by demonstrating a prima facie case with a probability of success, that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2013] KECA 347 (KLR)).



12. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KECA 175 (KLR) explained as follows:

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.

13. The gist of the Plaintiff’s compliant can be inferred from their pleadings, more so the Plaint which I have summarised above. Going through the grounds raised by the Plaintiff, I find that it has not demonstrated a prima facie case for a number reason. First, on the contention that the insolvency proceedings maintained the status quo and preserved the assets of the Plaintiff including the charged properties, it is now settled law that a secured creditor, such as the Bank, is entitled to exercise its rights under the security document or statute in the event of default by a borrower and that the power is not subject to insolvency proceedings commenced against the borrower by any other creditor. As a secured creditor, the Bank is entitled to exercise its statutory power of sale without recourse to the court exercising insolvency jurisdiction (see *East Africa Cables PLC v Ecobank Kenya Limited* [2020] KEHC 7162 (KLR) and *Tusker Mattresses Limited v Equity Bank Kenya Limited & another (Insolvency Petition E018 of 2020)* [2022] KEHC 258 (KLR).
14. In any case, I have gone through the said orders of the court in HCCOMM No. E277 of 2023 and nowhere does it single out the suit properties for protection or preservation. I agree with the Bank’s submission that the assets being preserved were those of the debenture agreement and not the charge documents and that a debenture and a charge provide for remedies that are different and distinct from each other (see *Mc Tough & another v National Bank of Kenya Limited & another* [2023] KECA 1265 (KLR). The Plaintiff cannot therefore shield itself from its obligations under the Charges by hiding behind the insolvency proceedings.
15. Second, on the averment that the debt is “substantially” disputed, this just not true. The Plaintiff has expressly admitted that it is indebted to the Bank and that it has been working towards liquidating the outstanding debt. I agree with the Bank that nothing brings out the Plaintiff’s indebtedness than its letter of 14th June 2023 to the Bank in response to the Bank’s demand of 8th June 2023 where the Bank seeks payment of the total loan arrears of Kshs.529,456,035.90/=. In the letter, the Plaintiff does not in any way dispute the debt but rather explains why it has not been servicing the loan and seeks indulgences for consideration by the Bank. It is therefore my finding that the Plaintiff remains indebted to the Bank
16. Third, whereas the Plaintiff states that it has been making various efforts to repay the debt and that it is the Bank which has not been considering its payment plans and proposals, this court has stated time without number that it cannot force Banks to accept payment proposals of borrowers. It is not the business of courts to rewrite contracts between parties and parties are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved (See *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] KECA 152 (KLR) The primary task of the court is to construe the contract and any terms implied in it and as such, it cannot force parties into a bargain as it is not a matter of an entitlement bestowed upon the Plaintiff, whether by statute or by contract (*Muiga Enterprises Limited v Kenya Commercial Bank Limited* [2016] KEHC 8509 (KLR).
17. Fourth, on the contention that the Plaintiff has paid a substantial amount and that a dispute exists as to the exact amounts owed, it is now settled that a court cannot grant an injunction restraining a chargee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount



due under the charge (see J. L. Lavuna And Others Vs Civil Servants Housing Co. Ltd. & Savings And Loan Kenya Ltd [1995] KECA 111 (KLR)).

18. Fifth, on the contention that the suit properties are of sentimental value, it should not be lost that once the Plaintiff offered the suit properties as security for the loan granted to it, the same became a commodity for sale and damages are foreseeable. There is no property, however sentimental or peculiar, that is incapable of being valued and damages awarded for it (see John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] KECA 219 (KLR))
19. Having found that the Plaintiff has failed to demonstrate a prima facie case with a probability of success, the inquiry on whether they are entitled to an injunction ends at this point in line with the dicta in Nguruman Limited v Jane Bonde Nielsen and 2 Others(supra). There is no valid reason why the Bank should be restrained from exercising its statutory power of sale as the same has now crystallized following service of the statutory notices.

Conclusion and Disposition

20. It is the courts conclusion that the Plaintiff's application dated 17th October 2023 is without merit. The said application is dismissed forthwith. Costs are in the cause. Any interim orders in force are hereby discharged forthwith.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 11TH DAY OF NOVEMBER 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Nyachoti for the Plaintiff/Applicant.
2. Mr. Lawson Ondieki for the Defendant.
3. Amos - Court Assistant

