REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 11 OF 2017

1. ANFAKARI LIMITED

2. SORIANO ANTONIO

3. SORIANO CARLO LUIJI

4. SORIANO FRANCESCO.....PLAINTIFFS

VERSUS

SBM BANK KENYA LIMITED FORMERLY

FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Wameyo Onyango Advocates for the plaintiff

Muthee Kihiko Soni Advocates for the defendant

J U D G M E NT

The 1st plaintiff is a company duly incorporated under the Laws of Kenya carrying on the business within the Republic whereas the 2nd, 3rd and 4th plaintiffs are adults of sound mind and directors of the 1st plaintiff.

The gist of the cause of action is a loan agreement entered into on or about 2.8.2011 in which the defendant Bank advanced the 1st plaintiff an aggregate loan facility being a sum of Kshs.6,000,000/=. It was a term of the loan agreement that the interest on the term loan facility would accrue on a monthly reducing balance on the basis of the actual number of days elapsed at the base lending rate of 15.75% per annum plus 1% per annum making effective rate of 1675% per annum. Towards this loan agreement, the 1st plaintiff pleaded in the plaint that it made several payments and as at 21.5.2015, they totaled Kshs.5,942,327/=.

As a result, the outstanding due and owing remains to be Kshs.1,683,984.79/=. The 1st plaintiff and the directors were shocked to be served with a demand notice of Kshs.3,635,339.58/= under restructured loan

scheme to be repaid for a further 38 months. The plaintiffs therefore do deny the new restructured loan for lack of a company resolution and the amount due as at the date of restructuring agreement. The plaintiffs further aver that the executed charge document by the 2nd and 4th plaintiffs as directors of the 1st plaintiff happened at a time when each of them was out of the country and could not have signed the charge and further charge dated 3.11.2011. That the 3rd plaintiff's wife also did not have the authority to execute the further charge, for reason of not being a director of the company.

It is therefore instructive that the notification of sale of the 1st plaintiff property known as **LR 749 (originally 703/10 Malindi)** is null and void. The defendant bank in its own scaled amended defence deny any such averments in the plaint and maintained existence of a loan facility covenanted later with a restructured repayment period for the outstanding Kshs.3,635,339.58/= exclusive of interest and other incidental costs. The gravemen of the plaintiffs' claim is that the defendant exercised its contractual obligations and rights of the power of sale in complete bad faith.

The Plaintiffs Evidence

The testimony on oath was given by **Soriano Carlo Luiji**, suing as the 3rd plaintiff. The witness evidence itemized by way of background told the Court as follows:

> ***(1). That on or about 2.8.2011, the defendant bank advanced the 1st plaintiff company a sum of Kshs.6,000,000/=.***
>
> ***(2). That the 1st plaintiff made several repayment and by 21.5.2015 had made a total sum of Kshs.5,942,327.21/=.***
>
> ***(3). Leaving a balance of Kshs.3,635,339/=.***
>
> ***(4). That the demand of Kshs.3,635,339.58/= lacked any basis as recorded in the demand notice.***
>
> ***(5). That further, there was no company resolution passed by the 1st plaintiff for the new term loan and or the alleged agreement restructuring term loan as indicated in the agreement.***
>
> ***(6). That in view of the defects to the loan agreement the statutory notice issued by the defendant fails to comply with the provisions of the Registration Law Act 2012 to call for a dismissal of the claim.***

In support of the entire claim, the plaintiff further relied on the admitted documentary evidence comprising of ***a bundle of cash deposits, Letter dated 17.3.2015, letter dated 9.4.2015, letter dated 10.4.2015, letter dated 23.4.2015, letter dated 14.7.2015, Recommended payments made to the defendant letter by Nairobi Connection Services Auctioneers dated 9.5.2016, letters by Philip Moka dated 5.9.2008 by Assistant Registrar of Companies, Certificate of Incorporation dated 5.5.2008, further charge document dated 3.11.2011.***

In summary the plaintiff urged this Court to grant the reliefs sought in the amended plaint.

> ***(a). A declaration that the loan balance as at 4th September 2014 is in terms of the original loan agreement and not the alleged restructured term loan agreement.***
>
> ***(b). The production by the defendant of the loan statement showing the principal loan amount, the interest and applying the interest rate as agreed in the original loan agreement.***
>
> ***(c). An injunction restraining the defendant from advertising for sale, selling by public auction or in any manner whatsoever disposing off all that property known as LR No. 749 (Original No. 703/10) Malindi in purported exercise of its statutory power of sale in respect thereof.***

(d). Costs of this suit.

The defence case

To answer the plaintiffs' claim, the defence relied on the testimony of **Rashid Jeneby**, a branch manager with the defendant bank. It was the case for the defendant that the 1st plaintiff applied for a loan facility of Kshs.3,000,000/= on or about 7.4.2009. The terms of the loan are as stipulated in the loan agreement of 21.4.2009. Subsequent to that agreement was a charge instrument over **LR No. 749/originally 703/10 Malindi** in favor of the defendant bank. The defence witness further told the Court that the 2nd – 4th plaintiff also gave personal guarantees and indemnity for the aforesaid loan facilities. It was also the evidence by the witness that the relationship with the plaintiff, did not end there as further loan facilities were extended on or sometime in the year 2011 of Kshs.6,000,000/=. The further facility also attracted and did necessitate a creation of a charge to secure the amount. That contract on the original loan stated the defence witness that on 20.8.2014, there was a need to restructure as endorsed by annexure 18. In laying what item as the legal foundation of the contract, the defence witness told the Court that following the restructured terms of the loan all other conditions in the original letter of offer remained binding and unaltered.

On the part of the defence documentary evidence of relevance included CR12, Application for Credit, Board Resolution of the 1st plaintiff, customer visit form, term loan facility, 3 charge, guarantee & indemnity, certificate of search, further charge, term loan facility resolution to borrow, various letters by the defendant bank and statement of accounts.

Plaintiffs' Submissions

Mr. Wameyo on behalf of the plaintiff relied on the written submissions dated 16.6.2021 which crystallized the issues on lack of existence of a further charge and a board resolution by the 1st plaintiff authorizing the transactions subject matter of the suited claim against the defendant.

Learned counsel further submitted that the defendant failed to serve the requisite statutory notice of sale and their subsequent actions to exercise statutory powers of sale were therefore null and void. According to Learned counsel contention, that beside those defects, the cited further charge by the defendant was signed by a person not a director of the plaintiff company. For these submissions, he relied on the guiding principles in the case of **Michael Gitere & Another v Kenya Commercial Bank Ltd {2018} eKLR and Joseph Okoth Waundi v National Bank of Kenya Ltd {2004} eKLR**

Consequently, Learned counsel submitted that there are serious issues that makes the entire loan agreement unenforceable by the defendant.

The Defendant Submissions

Mr. Ngaira, Learned counsel for the defendant submissions accrue from inviting the Court to be guided by Order 40 Rule (2) of the Civil Procedure Rules and the dicta in **Giella v Cassman Brown Co. Ltd {1973} EA 358 and Mrao Ltd v First American Bank of Kenya Ltd & 2 others {2003} KLR 125.** That the nature of the claim does not qualify for grant of a relief of a permanent injunction. Learned counsel further submitted that no reason in principle why a contract with the effect of which was to increase restructure the loan payable with mutual agreement with the parties should be struck down.

In the circumstances explained by the plaintiff Learned counsel contended that it may well be that, the defendant in providing the financial assistance ought generally not to inquire into the internal operations of the 1st plaintiff. That the plaintiff paints a picture that certain kinds of obligations performed were oppressive or unconscionable cannot release them of the duty to repay the loan amount. Further counsel submitted that the defendant as an innocent party is entitled to ignore the contract breaker because the minimum condition precedent for an order to satisfy the expectations in the nature of the observance of the contract remains uninterrupted. In the words of counsel, the trial test is whether the doctrine of

constructive notice ought not to apply to facts and surrounding circumstances of this case. To strike a balance on some broad discretionary approach on the notion of the bargaining position of the parties counsel cited and relied on the principles in **Royal British Bank v Turquand.**

In general terms, Learned counsel submitted that the stipulation of a *primafacie* case for grant of a permanent injunction has not been satisfied by the plaintiffs.

Analysis and Resolution

The plaintiff in this case has raised many issues in regard to the mortgagor and mortgagee loan agreement with the defendant bank. All things being equal, the cornerstone of the claim is whether the plaintiff has satisfied the criterion for this Court to grant a permanent injunction against the mortgagee.

The Law

Let me start with the obvious principles as illuminated in the cases of **Esther Njeri Komu v Consolidated Bank Ltd & Another {2013} eKLR, Joseph Okoth Wandi v National Bank of Kenya CA No. 77 of 2004** where it was stated that:

> ***"It is trite Law that Court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute or because the mortgagor has began on redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained however, if the mortgagor pays the amount claimed in Court, that is the amount which the mortgagor claims to be dire to it."***

Whether a particular case comes within one category or the other will depend on a close examination of the nature of the issues and the strength of the evidence as well as the significance of the terms of the loan agreement. In the cases of **Cayman Ltd v International Marbeith Club (S.A), Carey J. A.** quoted with approval **Coeten L. J.** in **Mcleod v Jones {1884} 24 Ch. D. 289 at 299** as follows:

> ***"Now under ordinary circumstances, the Court never interferes unless there is something very strong; it does not interfere on any suggested case without requiring the plaintiff applying to pay into Court, not what the Judge of the Court on hearing the evidence is satisfied with probably be the amount due, but what the mortgagee, the accounts having been taken swears, is due to him on his security. And that is perfectly right, because we ought not to prevail the mortgagee from exercising the powers given to them by their security without seeing that they are perfectly safe."***

The correctness of this view is backed up by the statement formulated in **Law of mortgage 11th Edition** which states:

> ***"The mortgagee will not be restrained from exercising his power of sale if, before there is a contract for the sale of the mortgaged property, the mortgaged property, the mortgagor lenders to the mortgagee or pays into Court the amount claimed to be due. The amount due for that purpose is the amount which the mortgagee claimed to be due to him for principal interest and costs unless, on the face of the mortgage, the claim is excessive in which case, the amount claimed less such excess must be tendered or paid."*** *(emphasis provided)*

What is in contention is whether the mortgage statutory power of sale under Section 90 (1) – 3 of the Land Act 2012 had arisen.

From the content of the evidence which has been laid down before the Court, I do not think it can be denied that a bonafide process under the mortgage agreement was taking place and any statutory power of sale had been obtained for that purpose. A basis of issuing the notice of sale in the view, I would be required by virtue of the statutory law to operate within this regulatory framework to minimize the risk of liability.

(a). the circumstances under which the power of sale may be exercise has arisen;

(b). the power of sale is given solely for the purpose of enabling the mortgagee to recover the money he has lent;

(c). the mortgagee must act in good faith.

(d). the power cannot be exercised for a purpose other than recovery of the money and where there are dual or multiple purposes the substantial purpose must be to realize the security;

(e). accepting that the mortgagee is not a trustee for the power of sale and he is not in a fiduciary relationship with the mortgagor and accepting that the mortgagee can sell at a time most advantageous to himself and accepting that he may exercise the power to the detriment of the mortgagor the mortgagee cannot act fraudulently, recklessly, in a non-business-like manner or completely ignores the interests of the mortgagor;

(f). the mortgage must take reasonable steps or precautions to get the best possible price at the time the property is sold (not when the right to exercise the power arises) having regard to all the circumstances of the case.

(g). if the property is to be sold by auction, ensuring that it is properly and accurately described;

(h). while there is no duty to advertise the property, should the mortgagee choose to do so he must take care so that the property is accurately and fairly described and in particular he must state anything that may point to the property having a special type of value. For example, if planning permission has been given to enable a certain type of development which may or quite likely may increase the value of the property then that must be stated;

(i). the mortgagee need not wait for an improved market;

(j). the mortgagee may sell at an undervalue but where there is a gross undervalue that fact alone may enable the court to conclude that the sale was dishonestly done and therefore fix the mortgagee with liability;

(k). if selling by auction the mortgagee cannot escape liability by saying that he hired a competent auctioneer;

In answering the question, the Court has to consider the evidence by the mortgagor and the rebuttal given by the mortgagee. The refocus is on the terms of the facility, any re-negotiations of those terms and whether the machinery provisions in those facilities and otherwise have been complied with as set out in the statute and other analogous provisions to the loan agreement.

In the instant case, it is quite clear that the mortgagor was advanced a loan amount by the mortgagee as supported in the letter of offer dated 2.8.2011. The facility of Kshs.6,000,000/= was to be utilized by the mortgagor to repay outstanding account **No. 802,00007** and to facilitate further developments on portion **No. 749 – Malindi.** It is not disputed that some repayments had been made to liquidate the loan amount but also in the same vein there is a balance of the debt that has fallen due by effluxion of time. There was no evidence from the plaintiff of the real prospect in the foreseeable future being able to pay it and the allegations of the defendant's misconduct were not overwhelming to rescind the contract.

I must at this juncture remind the parties the time honored principle of privity of contract. That the Courts in interpreting written contracts must hold the parties to account for they are bound by the express contractual terms and obligations. Having carefully considered the claim and the reliefs prayed for by the plaintiffs, I am guided by the decision in **Blount v Smith 12 Ohio St. 2d 41 231 N. E. {1967}** the Court held**:**

"The right to contract freely with the expectation that the contract shall endure according to its terms is as fundamental to our society as the right to write and to speak without restraint. Responsibility for the exercise, however improvident, of that right is one of the roots of its preservation. A rule of Law which would sanction the renunciation of a bargain purchased in freedom from illegal purpose, deception, duress, or even from misapprehension or unequal advantage (cf. Sheeby v Seilon, Inc., 10 Ohio St. 2d 242) leads inexorably to individual irresponsibility, social instability and multifarious litigation. People should be entitled to contract on their own terms without indulgence of paternalism by courts in alleviation of one side or another from the effects of a bad bargain."

Similarly, in **Ullmann v May 147 Ohio St. 468, 72 N. E. 2d 63 {1947}:**

"Courts do not relieve a party competent to contract from an improvident agreement in the absence of fraud or bad faith."

In assessing the significance of this case keeping in mind the basic tenets of competent parties to contract, there is a constructive intention that the plaintiff referring to the various alleged misdeeds by the defendant illustrates a propensity to repudiate the contractual terms. That in itself would render it unenforceable and yet they are bound by what they signed. Whether one refers to the clause on interest or statement of accounts thereof I find no evidence that this was an unconscionable contract. In the latest edition of **Cheshire and Fifoot on the Law of Contract** the matter is put in this way:

"A contracting party is bound because he has agreed to be bound. Agreement, however, is not a mental state but an act, and as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds, but by what they have said or written or done."

The right to contract is one of those fundamental rights in our society that is frequently loaded and rightly supports a functional market based economy in which predictability is prized.

From the terms of the loan agreement, this was a secured facility in line with the existing legal charge earlier on stamped to cover three million sums over parcel of land **No. 749 originally 703/10/Malindi**. In addition, there was a joint and several guarantees of indemnity in favor of the defendant bank from **Soriano Carlo Luiji, Antonio Soriano** and **Francesco Soriano.**

A personal guarantee is essentially a promise or agreement to make oneself personally liable for a debt. It is an unsecured written promise to be responsible for the debt of another party or entity, often seen in the context of a director of a company or business owner in his or her personal capacity guaranteeing payment. In light of the above principle, the term guarantee should be interpreted to be instructive of situations where a party offers herself or himself as a security to the loan.

In the impugned letter of offer dated 2nd August 2011, the guarantors absolutely, unconditionally and irrevocably guaranteed the loan due and punctual repayments of the instalments to the defendant bank. The import of this guarantors' obligations is that under the agreement it shall be direct, absolute and unconditional irrespective of the legality, validity or enforceability of promissory note or the legal instrument signed by the guarantor. The 1st plaintiff, therefore claiming that **Francesco Soriano** was not a director of the company does little to exonerate it from setting the loan amount borrowed from the defendant bank. The correct view is that each signee to the agreement agreed directly or indirectly to be bound by the terms of the contract between the 1st plaintiff and the defendant.

That he or she had the authority to sign the agreement in his or her individual capacity as a representative or director of the 1st plaintiff company. The undersigned individuals to the letter of offer with terms and obligations by execution of it undertook, and assumed jointly and severally the full performance of the aforesaid agreement including payment of amount due and owing.

The wife of **Soriano** cannot be allowed to disclaim responsibility for the debt. To that extent in this

claim, the plaintiffs sought to challenge guarantorship by **Francesco** in line with the principles propounded in **Salomon v Salomon & Co. Ltd:**

> ***"The Salomon principles provides that a company is essentially regarded as a legal person separate from its directors, shareholders, employees and agents. This means as a separate legal entity, a company can be sued in its own name and own assets separately from its shareholders. Essentially, the corporate veil is a metaphoric veil with the company on one side of it and its directors and shareholders on the other side."***

In my view, when interpreting this predominant principle in company Law, Courts should bear in mind that corporate veil does not exist as a safe net to protect its shareholders or directors when their personal conduct has been permitted to enter into sham commercial transactions. Generally, this is what the 1st plaintiff is asking the Court to delve so as to render the loan agreement unenforceable. It is necessary at this stage to briefly pause the question whether, the plaintiff has a legal right which is being threatened and deserves to be protected.

Assessing the validity of the charge instruments which purpose to anchor the contract terms and obligations its correct to state that a claim for injunction is won or lost on the basis of competing legal rights. **(See Akapo v Hakeen – Habeeb {1992} 6 NWLR 266 AT 289).**

Thus, the plaintiffs purport to assert legal rights over the property offered as security in favor of the defendant bank to guarantee the realization of the debt due in the event of default is inequitable. The Court in the case of **Royal Bank of Scotland PLC v Etridge {2002} AC 733** stated interalia:

> ***"That the Law must afford both parties a measure of protection. The lender who thus also feels able to advance money or security, including non-possessory security, like land, in reasonable confidence that it may at an appropriate time enforce the security is also protected. A purposive construction of Section 90 is necessary. Section 90 must thus be read and understood with the open fact that the chargee also has a right to pursue his various remedies. Any interpretation, which curtails that right, should not be favored, given that it is the same Section that triggers the appreciation of a chargees rights and remedies."***

In the circumstances of this case, the suit filed by the plaintiffs does not lie on the basis of the issues raised in the plaint and the corresponding evidence admitted before Court. The defendant bank has a genuine legal interest with regard to title which the plaintiffs offered as security for the loan amount borrowed and acknowledged in the various exhibited documentary evidence.

Again going by the pattern and holding words in the case of **Kenya Power Lighting Co. Ltd v Sheriff Moyana Habib {2018} eKLR** there are no inking points that can cure the defects in the plaint and subsequent evidence for this Court to grant a permanent injunction. In the event, such orders were to be issued, the resultant effect is to restrain the defendant bank to cease from exercising the statutory power of sale pursuant to Section 90, 91 and 92 of the Land Act 2012.

There are no reasonable grounds canvassed by the plaintiffs on a balance of probabilities for this Court to use its judicial power to interfere with the liberty of the parties to exercise their right to contract freely. Indeed, there is no evidence that the plaintiffs fall under a class not equal in intelligence and capacity both the defendant to assert their rights to the mortgage agreement. The defendant bank has demonstrated some financial default which remains unremedied at the time the plaintiffs filed the suit and the power of sale is of nature to scale enforceable events on which the mortgage relies takes effect.

The defendant's bank power of sale had arisen and became exercisable under the Land Act notwithstanding the issues on chargeable interest complained of by the plaintiffs. With that in mind, the plaintiffs are not entitled to prevent a sale by the defendant bank unless, evidence shows an unconscionability of the entire contract terms. In my view that is not the case in this contractual relationship between the plaintiffs and defendant bank.

For those reasons, I would therefore dismiss the claim in its entirety with costs to the defendant.

It is so ordered.

DATED, SIGNED and DISPATCHED AT MALINDI via email ON 6TH DAY OF OCTOBER 2021

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R. NYAKUNDI

JUDGE