Trustees of Maximum Miracle Centre v Equity Bank (K) Limited (Civil Case E055 of 2021) [2021] KEHC 237 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)

Neutral citation: [2021] KEHC 237 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E055 OF 2021

WA OKWANY, J

NOVEMBER 11, 2021

BETWEEN

TRUSTEES OF MAXIMUM MIRACLE CENTRE ..... PLAINTIFF

AND

EQUITY BANK (K) LIMITED ..... DEFENDANT

RULING

1. This ruling is in respect to the application dated 27th January 2021 wherein the applicant/plaintiff seeks the following orders: -

    a. An order of injunction restraining the defendant from completing the sale, transfer, register, taking possession alienating or dealing with LR Nos. 209/525/38, 209, 525, 39 and L.R. No. 13330/604 Nairobi pending determination of the application and suit.

    b. The Auctioneers costs and other charges occasioned by the fraudulent statutory notice dated 12th October 2020 be borne by the defendant.

    c. Costs.

2. The application is supported by the affidavit of the applicants' Managing Trustee Bishop Pius Muiru Mwangi and is premised on the grounds that: -

    1. On or about 22nd July, 2010 the parties hereto entered a written loan agreement whereby that the plaintiff borrowed a sum of shs 216 million for purchase of L.R. Nos. 209/525/38, 209/525/39 and 209/525/40 and L.R. No. 13330/604, Nairobi County.

2. The said loan was secured by way of several securities and was to be repaid at the rate of shs 4,107,738/- per month over a period of 84 months.

3. That right from the very first month after drawdown the defendant varied the interest rates without informing the plaintiff and contrary to Section 84 *Land Act* 2012.

4. Due to the repeated interest overcharged after the lapse of the 84 months the loan was not fully repaid. Instead as at 12th October 2020 the account indicated on outstanding balance on account of shs 153 million as due and owing.

5. The aforesaid balance comprises of illegal and uncontractual interest charges which are neither due nor owing.

6. On 23rd December 2020, during a routine visit to the defendants Tom Mboya Avenue, Branch in Nairobi the plaintiff was issued with a statutory notice dated 12th October 2020 which was purported to have been served by way of registered mail.

7. The said statutory notice in invalid as it has denied the plaintiff its due rights under the law.

8. With the 90 days' period having lapsed on 12th January 2021, the defendant is about to commence the process of advertising the plaintiff's securities for sale. Any such advertisement will be illegal and fraudulent in light of the averments above.

3. The respondent opposed the application through the replying affidavit of Kariuki Kingori who confirms that the plaintiff obtained a loan of Kshs 216,000,000 from the defendant in the year 2011 but failed to comply with the agreed repayment terms from the very onset thereby leading to unabated debt growth due to the imposition of 6% default penalty above the applicable interest rate. He avers that the defendant reserved the right to amend the interest charges without prior notice to the lender and that the interest rate charged was in accordance with the salient terms of the loan agreement.

4. Mr. Kingori avers that as a result of the plaintiff's default, the defendant was justified and well within its rights to exercise its statutory power of sale.

5. Parties canvassed the application by way of written submissions and highlighted the issues for determination to be as follows: -

   A. Did the defendant breach the provisions of Section 44 of the *Banking Act*?

   B. Whether the plaintiff defaulted in payment of the loan amount?

   C. Is the plaintiff entitled to orders sought?

6. Regarding breach of the provisions of Section 44 of the *Banking Act*, the applicant submitted that the defendant illegally varied the loan interest rates contrary to Section 44 of the said Act.

7. On its part, the defendant submitted that the plaintiff did not disclose that it defaulted in the loan repayments as agreed and that Clause 4 of their agreement entitled the defendant to levy default interest rate on the loan facility. The defendant added that Clause 5 of their agreement granted it the right to amend the interest charges without prior notice to the borrower. The defendant argued that interest rates adjustments, as opposed to bank charges, are not regulated under Section 44 of the *Banking Act*.

8. For this argument, the defendant cited the decision in *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR* where the court held that: -

> " Section 44 was not available as a defence since it related to bank charges which are distinct from the interest charges as they concern the price or cost of banking services or products, notably commissions. Interest rate not regulated under Section 44 and a bank that wishes to adjust interest applicable to a loan facility is not obligated to seek Ministerial approval."

9. The defendant further submitted that variation of interest was not only contemplated in the contract but that the infringement, if any, would be validated under Section 52(1) of the *Banking Act* as there was no statutory limitation to interest at the time the loan facility was created.

10. On whether the plaintiff defaulted in the loan repayments, the defendant submitted that this was a fact that was not disputed and that the plaintiff intentionally failed to disclose this default.

11. On whether the plaintiff is entitled to the orders sought, the defendant submitted that the application does not meet the conditions for the granting of orders of injunction.

12. On its part, the plaintiff submitted that the defendant had no right to increase/vary interest rates indiscriminately and further, that in view of the fact that the indiscriminate variation of interest rates made the loan to balloon from the initial sum of Kshs 216 million to Kshs 500 million, the defendant's actions were unjustified, illegal and unconscionable thus amounting to the establishment of prima facie case and attracting the court's intervention.

13. The plaintiff also faulted the defendant for serving the Statutory Notice upon them by way of registered post as opposed to personal service.

Analysis and determination.

14. I have carefully considered the application dated 27th January 2021, the defendant's response, the parties' respective submissions together with the authorities that they cited. The main issue for determination is whether the plaintiff had made out a case for the granting of orders of temporary injunction. Underlying the said main issue are the issues of whether the defendant breached Section 44 of *Banking Act* whether the plaintiff defaulted in the loan repayments and whether the plaintiff was served with the Statutory Notice.

Injunction

15. The conditions for the granting of orders of injunction were well explained in the case of *Giella vs Cassman Brown & Co. Ltd (1973) E.A* wherein it was held that: -

> " The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

16. In *Nguruman Limited vs Jan Bonde Nielsen & 2 Others, CA No. 77 of 2012*, the court discussed the 3 conditions for granting orders of injunction as follows: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).

17. What amounts to a prima facie case was discussed in *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125*, as follows: -

> " ...So what is a prima facie case? I would say that in civil cases it is a case in 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...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."

Variation of interest rates.

18. The plaintiff cited Section 44 of the *Banking Act* to support of its argument that the defendant had no right to vary interest rates. In a rejoinder, the defendant stated that Clause 4 of their Agreement entitled it to vary interest rate in the event of default.

19. Section 44 of the *Banking Act* stipulates as follows: -

> " Restrictions on increase in bank charges- No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."

20. Clause 4 of the letter of offer sent to the plaintiff reads, in part, as follows: -

> " The lender reserves the right to amend interest charges without prior notice to the borrower"

21. While courts have taken the position that parties are bound by the terms of their agreement, and that the court cannot rewrite the terms of an agreement (See *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited (2014) eKLR*), courts have also held that the lender's right to vary interests is not absolute and cannot be exercised willy-nilly to charge exorbitant interest rates.

22. In the present case, it is not disputed that the plaintiff obtained a loan facility from the defendant which it repaid, albeit not in full, and that a dispute arose over the interest rates charged by the defendant.

23. The plaintiff avers that the defendant acted in bad faith by increasing the interest rates without any justification and from the very onset of the loan repayment. The plaintiff further stated that a review of their contract by Interest Rates Advisory Centre Ltd (IRAC) revealed that: -

    i. The defendant had not complied with the terms of the lending right from the very first month after draw down, when it overcharged the applicable interest.

    ii. The plaintiff's loan account had been overcharged throughout the loan repayment period as at 15th September 2020.

    iii. After the plaintiff paying a total of shs 350,640,968.07, there was a re-calculation difference in the outstanding cleared balance as at 15th September 2020 between the defendant's debit balance of shs 150,829,061.80 and IRACs debit balance of shs 27,963,260.50.

    iv. Accordingly, there was a total over charge of shs 122,865,801.43 in favour of the 1st plaintiff which ought to be off set against the plaintiff's loan account thus leaving an outstanding balance of shs 27,965, 260.50.

24. My finding is that owing to the huge disparity between the loan arrears reflected in the Interest Rates Advisory Centre Ltd review report and the amount claimed by the defendant, the plaintiff's claim on exhorbitant variation in interest rates is a factor that the court cannot overlook. My take is that even though Clause 4 of the agreement entitled to defendant to vary interest rates, such variations should have been done in an open and transparent manner and definitely not from the very onset of their agreement.

25. Even though the court is at this stage not required to determine the merits of the case before it, I find that the plaintiff has established that it has a prima facie case against the defendant.

26. On the issue of substantial loss, I note that the plaintiff's claim that it had already paid kshs 350,640,968.07 toward the loan repayment as at 15th September 2020 as against the defendant's debit balance of Kshs 150,829,061.80 and Interest Rates Advisory Centre's debit balance of Kshs 27,963,260.50 is an issue that this court cannot overlook.

27. According to the plaintiff, its total over charge of kshs 122,865,801.43 should be off set as against its loan account so as to leave an outstanding balance of Kshs 27,963,260.50.

28. I find that owing to the colossal sum of money that the plaintiff has already paid towards the loan repayment, the plaintiff will suffer substantial loss should the charged property be sold. In sum, the balance of convenience tilts in favour of granting the interim injunctive orders sought but with a rider that the plaintiff pays the undisputed sum of kshs 27,903,260.50 within 6 months from the date of

this ruling failure to which the defendants will be at liberty to proceed with the exercise of its statutory power of sale.

29. The costs of this application shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Mbaji for Ms Wamuyu for Defendant.

Mrs Kamau for Kyalo for the Applicant.

Court Assistant: Margaret