



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO.42 OF 2019.

TRANSAFRIC TIMBER LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL BANK OF

KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This is a ruling on application motion dated 25th November 2019 filed by Plaintiff/Applicant under certificate of urgency seeking the following orders:-

a. Spent;

b. Spent

c. That pending the hearing of this suit, temporary injunction enjoining and injunction against both Defendant and their servants not to interfere with the suit properties namely, Nakuru Municipality Block 1/917 Langalanga, Nakuru Municipality Block 7/3 and Nakuru Municipality Block 2/299 situated in Nakuru howsoever and not to trespass on the suit land, not to survey, demarcate, take possession, sell, erect any building, convey or transfer the suit land and portions thereof or adversely deal with the suit property in any way contrary to the Applicant's interest.

d. spent

e. That pending the hearing of this suit inter-parties, temporary injunction be issued against the respondent to stop any dealings, transactions including penalties and interest on loan account number 011T0020246800 held by the applicant with the respondent until a professional audit is conducted on the said account to ascertain the extent of irregularity and unauthorised transactions carried out by the bank official.

f. That the costs of this Application be awarded to the Applicants.

2. This application is based on grounds on the face of the application and affidavit sworn on 25th November 2019 by **Zakayo Maina Waweru** a director in the applicant's company.

3. Zakayo Maina Waweru averred that the applicant and the respondent entered into several monetary contracts that resulted in the registration of several charge instruments in favour of the respondent to act as securities for the loans advanced.

4. That the Respondent advanced to the Applicant the following amounts:-

a. Loan secured by the registration of a charge, further charge, 2nd further charge and 3rd further charge respectively against Title No. Nakuru Municipality Block 1/917 Langalanga;

i. 1st July 1996 - Kshs. 3,500,000/=;

ii. 23rd July 2008 – further loan of Kshs.500,000/=;

iii. 20th August 2013 – 2nd further loan of Kshs. 6,800,000/=;

iv. 21st May 2019 – 3rd further loan of Kshs. 34,200,000/=.

b. Loan secured by the registration of a charge, further charge, 2nd further charge and 3rd further charge respectively registered against Title No. Nakuru Municipality Block 7/3;

i. 12th November 2008 – Kshs. 56,000,000/=;

ii. 21st November 2013 – further loan of kshs. 12,000,000/=;

iii. 4th July 2013 - 2nd further loan of Kshs. 58,000,000/=;

iv. 21st May 2014 – 3rd further loan of Kshs. 219,808,000/=;

c. loan facility of Kshs. 240,000,000/= secured by a legal charge registered against Title No. Nakuru Municipality Block 2/299.

5. The applicant aver that it complied with the terms and conditions as per the charge instruments registered and fully serviced the loan facility; that despite complying with loan repayment the applicant learnt sometimes in the year 2018 in the local dairies that some fraudulent actions had been perpetrated against its loan account held with the Respondent; based on the nature of business relationship and mutual respect the applicant placed heavy reliance on the respondent reassurance that all will be well and he proceeded to service the loan.

6. However, on 6th November, 2019 the applicant received a letter from Legacy Auctioneers attaching a notification for sale of the 3 properties on 20th January 2020 due to the arrear owed to the respondent of Kshs. 522,830,603.17 as at 29th October 2019 if the said amount was not paid in full.

7. The applicant avers that it does not owe any money to the respondent and states that it is the respondent who owes the applicant money.

8. The applicants prays for preservatory orders on the 3 properties charged to the respondent as securities to allow time to resolve the errors and omissions surrounding the applicant's loan account as the applicant is apprehensive that the respondent will sell the 3 properties as scheduled which will cause immense suffering and financial losses to the applicant which cannot be compensated by way of damages; that it is in the interest of justice and fairness that the application be allowed as prayed.

9. In response the respondent filed replying affidavit dated 8th December 2019 sworn by Mary J. Tallam, Nakuru Branch Manager of the Respondent, she averred that as at 3rd December 2019, the amount owing from the applicant to the respondent is Kshs. 528,217,524/= and the said amount continues to accrue interest.

10. The respondent averred that the business relationship between applicant and respondent started in 2011 and the loans advanced to the applicant were secured by asset debentures of the applicant, director's guarantees, personal guarantees and registering legal charges against Titles no. Nakuru Municipality Block 1/917 Langalanga, Nakuru Municipality Block 7/3 and Nakuru Municipality Block 2/299 all situated in Nakuru and the loan advanced against the said titles were as follows:-

i. 6th August 2011 – Applicant guaranteed Kshs. 1,000,000/=

ii. 26th July 2012 – a loan of Kshs. 40,000,000/=

iii. 5th December 2012 – an overdraft facility of Kshs. 12,000,000/=

iv. 13th June 2013 – a financial facility of Kshs. 194,674,602.05/= (all consolidated).

v. 28th April 2014 - a financial facility of Kshs. 441,101,000/= (all consolidated).

vi. 11th June 2014 - a financial facility of Kshs. 391,101,000/= (all consolidated).

vii. 8th July 2014 - a financial facility of Kshs. 430,027,000/= (all consolidated).

viii. 28th August 2015 - a financial facility of Kshs. 423,143,389/= (all consolidated).

11. Respondent averred that, the plaintiff's loan facilities began to fall in arrears in the year 2015 and on several occasions the applicant has sought for restructuring of the loan facilities to enable and accommodate the applicant to get better and flexible repayments terms.

12. Further, that even after the applicant made promises to standardize their account, the said promises were never honoured except for some modest and staggered remittances. Following the applicant failure to honour promises, the respondent started issuing notices as follows:-

i. 7 days' notice dated 18th December 2017 demanding for accumulated arrears of Kshs. 10,316,142/25.

- ii. 30 days' notice dated 22nd January 2018 demanding for accumulated arrears of Kshs. 13,991,784/70.
- iii. 90 days' statutory notice dated 14th January 2019
- iv. 40 days' Notice of intention to sell the securities dated 27th May 2019.
- v. 45 days' Redemption Notice dated 7th November 2019.

13. The Respondent further averred that the Applicant has severally acknowledged owing the Respondent huge amounts of money as per the letter dated 15th April 2019 and cannot therefore negate and say the bank owes it money; that he who comes to equity must come with clean hands and he who comes to equity must do equity and ,the applicant should therefore do equity by performing his obligations under the letters of offer.

14. The Respondent therefore prays that they be allowed to sell the securities so as to recover the entire outstanding debt as soon as possible as the outstanding loan involves quite a substantial of money which continues to increase, and since their main operation is banking business, continued delay in recovering the outstanding balance greatly prejudices the plaintiff's business and the amount might accrue and outstrip the value of the security thereby rendering it inadequate.

15. In a rejoinder, the applicant filed supplementary affidavit dated 11th December 2019 sworn by Zakayo Maina Waweru denying the contents of the replying affidavit and reiterated contents of the application. Applicant denied the respondent's contention that the loan facility fell into arrears and stated that the applicant always and dutifully continued to service the loan but the respondent has fraudulently tampered with the account to reflect to the contrary.

16. He further states the bank statements attached by the respondent to the replying affidavit confirms the applicant is up to date with servicing its loan facility as the balance outstanding as at 2nd December 2019 shows nil balance and the respondent have not tabled any statement before court to show the outstanding loan balance of Kshs. 520,000,000.

17. Counsels for the parties herein filed written submissions which I have perused and considered

APPLICANT'S SUBMISSION.

18. The applicants submitted that principles for grant of injunction are set out in the case of **Giella Vs Cassman Brown and Co. Ltd** as hereunder:-

- i. Applicant must prove *prima facie* case with high chances of success;**
- ii. Applicant must prove that he would suffer irreparable loss that cannot be compensated by an award of damages and**
- iii. if the court is in doubt, it will decide on a balance of convenience**

19. The applicant submitted that despite several requests, the respondent has failed to supply the applicant with bank statements so that they can monitor their loan repayment and believes that failure is due to fraudulent activities in their account and failure to credit into the loan account money paid, fraudulent withdrawals from the account and alleged false entries into the account.

20. Even though the applicant had alleged that they were not served with the statutory notices before the attempted sale, counsel for the applicant in her oral submissions admitted that the statutory notices were served.

21. The Applicant submitted that the letters attached by the respondent in the replying affidavit alleged to have been written by the applicant are forgeries as the applicant had not admitted ever owing any money to the respondent.

22. Counsel further submitted that the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice that a temporary injunction be issued to save the properties attached as securities to the respondent and also to pave way for the determination of the issues in dispute between the parties.

RESPONDENT'S SUBMISSION.

23. The respondent submitted that the applicant's allegations are without merit and should be dismissed as the applicant showed that he got loan advances from the defendant but has failed to table any evidence before the honourable court of proof of payment or any protest in regard to the repayment made.

24. The defendant further submitted that all the money paid by the applicant towards the loan repayment was deposited in the account and no unauthorized transfers were done without the knowledge of the applicant; that reliance on newspaper article is a blanket allegations without any proof as the respondent kept clean accounts as demonstrated by the statements and documents produced in court; Further, the Respondent did not make fraudulent entries in the Applicant's account apart from a few alterations that were made and the bank officer responsible were charged of the same.

25. Counsel relied on various case including **Giella Vs Cassman Brown and Co. Ltd, Mrao limited Vs First American Bank of Kenya**

limited & 2 others. Where the court stated that the Applicant had not demonstrated to the court that he is entitled to the orders being sought as he has not tabled any evidence before the court to show how he has repaid the loan amount thus failing to establish a prima facie case which is arguable. Further the Applicant has not shown any infringement of any right

ANALYSIS AND DETERMINATION

26. The Applicant is seeking injunctive orders under **Order 40 Rules 1 & 4** of the **Civil Procedure Rules** which provide as follows:-

Rule 1: Where in any suit it is proved by affidavit or otherwise—

a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

27. In deciding whether or not to grant an injunction courts are expected to examine the entire circumstances of the case while guided by the traditional principles set in the case of **GIELLA Vs. CASSMAN BROWN** as follows:-

a) Has the Applicant established a prima facie case with high chance of success?

b) Will the Applicant suffer irreparable damages unless an injunction is issued? And

c) Where does the balance of convenience lie?

28. In the case of **Suleiman vs Amboseli Resort Ltd (2004) eKLR 589** the court held as follows:-

“I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. ...counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....”

29. Further in **Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991** by the Court of Appeal stated as follows:

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...The court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing... The principle underlying injunctions is that the status quo should be maintained so that if at the hearing the applicant obtains judgement in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgement nugatory...As it is settled law that where the remedy sought can be compensated by an award of damages then the equitable relief of injunction is not available.”

30. From perusal of documents filed by parties herein, there is no doubt that the loan facilities were advanced to the applicant. It is also admitted that there were alterations in entries to the account by a bank official who was charged. It however emerged from the record that the entries were intended to reduce the amount owing to the respondent from the applicant. If that be the case then the illegal entries were intended to benefit the applicant herein. The applicant also alleges that that some money paid to the account was not credited.

31. Applicant’s counsel argued that the irregularities affecting the applicant’s account were done in 2015 and reversal were done in 2019; and that, after issuance of notice in January 2019, the applicant visited the bank to complain of amount owing.

32. From perusal of documents filed I note that in 2015 debit entries in the account were ranging from 28,000 to 30,000. There were

reflections of credit also in August 2015. I have seen repayments upto October 2015, 2016, 2017 and 2018 and debit of kshs 500 in 2019. Statements filed have not clearly brought out the amount alleged to be owing as at now.

33. From the foregoing it comes out clearly that there is need for reconcilliation to establish true status of the accounts. The Applicant has alleged that no statements were issued; though there is no prove that the applicant requested for the said statements earlier, it would be in the interest of justice to reconcile the accounts to establish exact amount owing from the applicant to the respondent.

34. Having found the above, my considered view is that pending reconciliation of accounts, it would be in the interest of justice to allow preservation of properties offered by applicant to respondent as securities. However I do note that the applicant was notified of the intention to auction the property by the respondent as stipulated by law. The applicant had time to make enquiry on amount owing or request for statements but instead decided to wait until close to date of sale of the property to make a request for statements. In view of the above,I am inclined to allow stay of sale with conditions.

35. FINAL ORDERS

- 1. Stay of sale do issue on condition that kshs 2 million is deposited in court on or before 19th January 2020**
- 2. Auctioneer fee be paid on or before 19th January 2020. In the event that auctioneer fee is disputed, the same to be deposited in court.**
- 3. Failure to comply with the 2 conditions above sale to proceed as scheduled.**

Ruling dated, signed and delivered at Nakuru this 16th day of January, 2020.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Jenifer - Court Assistant

Matu for plaintiff

Mr. Kiburi for defendant