REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E087 OF 2019

ELI HOLDINGS LTD.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

(1) Before this Court is the Amended Notice of Motion dated**24th April 2019** by which **ELI HOLDINGS LTD** (the Plaintiff/Applicant herein)seeks the following Orders: -

> **"1. SPENT**
>
> **2. THAT the Honourable Court be pleased to issue conservatory orders in terms of an injunction restraining the Defendants, their servants, agents or howsoever from harassing, threatening, advertising, publishing, attach-ing, auctioning, proclaiming, giving instructions for auction attachment or otherwise doing anything prejudicial regarding the Plaintiff's moveable and immovable properties, bank accounts until this application is heard inter-parties.**
>
> **3. THAT the Honourable court be pleased to issue conservatory orders in terms of an injunction restraining the Defendants, their servants, agents or howsoever from harassing, threatening, advertising, publishing, attaching, auctioning, proclaiming, giving instructions for auction attachment or otherwise doing anything prejudicial regarding the Plaintiff's moveable and immovable properties, bank accounts until this application is heard and determined.**
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> **4. THAT the Honourable Court to issue an order directing Kenya Commercial Bank (KCB) bank manager to oversee the enforcement of the orders granted herein.**

(2) The application was premised upon **Order 40 Rules (1)(2)(3), Order 8 Rule (5)** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act, Article 20, 21, 23, 25, 27, 28, 47, 50** and **159** of the **Constitution of Kenya 2010,** International Good Practice and all other enabling provisions. It was supported by the Affidavit of even date and Further Affidavit dated **7th June 2019 sworn by PETER KINYUA KIMONDO** a Director of the Plaintiff Company.

(3) **KENYA COMMERCIAL BANK** (the Defendant/ Respondent filed their Grounds of Opposition dated **2nd May 2019** as well as a Replying affidavit dated **9th May 2019,** sworn by **JUDE THADDEUS AWUONDO ONYANGO** the Senior Corporate Relationship Manager of the Bank.The application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **24th June 2019** whilst the Defendant/Respondent filed its submissions on **2nd July 2019.**

BACKGROUND

(4) The Plaintiff Company and the defendant Bank have enjoyed a cordial Banker/Client relationship for over forty (40) years.The Defendant Bank had on various dates extended secured financial facilities to the Plaintiff/Applicant as follows:-

> **(i)** Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/289** on **5th April 1990** for **Kshs.100,000/=**
>
> **(ii)** Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/290** on **21st June 1990** for **Kshs.100,000/=**
>
> **(iii)** Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/290** on **24th March 1992** for **Kshs.80,000/=**

(iv) Second Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/290** on **11th February 1999** for **Kshs.540,000/=**

(v) Third Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/290** on **12th May 2000** for **Kshs.1,000,000/=**

(vi) Fourth Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/290** on **30th December 2004** for **Kshs.1,150,000/=**

(vii) Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/289** on **30th December 2004**for **Kshs.350,000/=**

(viii) Fifth Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/290** on **25th February 2005** for **Kshs.1,400,000/=**

(ix) Sixth Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/289** on **19th August 2005** for **Kshs.1,000,000/=**

(x) Second Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/289** on **8th February 2010** for **Kshs.2,000,000/=**

(xi) Further Charge registered over Title Numbers **Naivasha/Mwichiringiri Block 4/289** and **Naivasha/Mwichiringiri Block 4/290** on **6th February 2012** for **Kshs.10,500,000/=**

(xii) Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/285** on **14th January 2014** for **Kshs.10,800,000/=**

(xiii) Further Charge registered over Title Number **Naivasha/Mwichiringiri Block 4/285** on **10th July 2014** for **Kshs.7,200,000/=**

(xiv) Further Charge registered over Title Numbers **Naivasha/Mwichiringiri Block 4/289** and **Naivasha/Mwichiringiri Block 4/290** on **10th July 2014** for **Kshs.27,183,029/=**

(5) In addition, the Defendant had also issued various Bank Guarantees to **VIVO Energy Kenya Ltd** (hereinafter "**Vivo**") on behalf of the Plaintiff for supply of Petroleum products. The said Guarantees were for **Kshs.2,693,580.25, Kshs.12,000,000/=** and **Kshs.13,500,000/=.**

(6) On **4th February 2019** the Defendant received demands dated **1st February 2019** from Vivo to pay the guaranteed sums. The Bank paid sums guaranteed totalling **Kshs.28,193,580.25** to Vivo on **6th February 2019**. The Plaintiff/Applicant contends that these withdrawals were made without its approval. The Plaintiff/Applicant claims that it had on **7th February 2019** written to "**Vivo**" asking them not to recall the bank guarantee until a matter being **Civil Case No.31 of 2019**was heard and determined.

(7) Upon paying out the guarantee to **Vivo** the Defendant informed the Plaintiff that its accounts were as a result overdrawn where the term loan was at **Kshs.663,946.25** and the current account was overdrawn by **Kshs.38,220,547.52**. The Defendant then wrote to the Plaintiff/Applicant on **5th March 2019** requiring it to regularize its accounts within seven (7) days. The Plaintiff failed to comply and by a letter dated **27th March 2019** the bank made a final demand to the Plaintiff to pay the outstanding balance of **Kshs.39,508,873.62.**

(8) It is averred for the Plaintiff that they severally wrote to the Bank asking them to stop the deductions as they (the Plaintiffs) had run out of business. The Plaintiffs position is that by making unauthorized deductions from its account the Defendant breached their contract with the Plaintiffs which breach of contract paralyzed the operations of the Plaintiff Company. The Plaintiff further avers that its overtures to the Defendant seeking to settle the matter amicably have been rebuffed leaving them no choice but to file the present application seeking injunctive orders from the Court.

ANALYSIS AND DETERMINATION

(9) I have carefully considered the submissions filed by both parties. The principles upon which a temporary injunction may be issued were set out in the case of **GIELLA –VS- CASMAN BROWN [1973] E.A** as follows:-

"(a) An Applicant must show a prima facie case with a probability of success.

(b) an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.

(c) Where the court is in doubt the application will be decided on the balance of convenience.

(10) The definition of what constitutes a "**prima facie**" case was given in the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA [2003] KLR** in which the Court of Appeal held:-

> **"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an "*arguable case*."**

(11) The Plaintiff contends that the Defendant Bank proceeded to pay out the various guarantees to **Vivo** without obtaining from the Plaintiff approval to make said payments. This the Plaintiff posits amounted to a Breach of the Bank/Client contract between the parties and on this basis the Plaintiff/Applicant submit that it has established a prima facie case.

(12) There do exist legal principles governing Bank Guarantees which include the **Principle of Independence** as well as the **Principle of strict compliance** as set out by **Hsu Chung Hsin** in his article titled **"The Independence of Demand Guarantees, Performance Bonds and Standby letters of Credit" NJUL Rev 1 2006** where it is stated thus:-

> **"the principle of independence of demand guarantees independent guarantees, performance bonds and standby credits (hereafter referred to as "documentary guarantees") means <u>that the payment undertaking contained in a documentary guarantee is separate from, and in the ordinary way independent of, the underlying contract giving birth to it; what the issuer is concerned with is whether the tendered documents or even a simple demand, comply with the terms and conditions of the undertaking, rather than with the disputes arising from the underlying contract</u>. This principle coexists with the principle that the issuer in documentary credit and documentary guarantee trans-actions deals with documents rather than goods, services, or performance of the underlying contract, and it is predicated on the intention of the parties to a documentary guarantee to let the beneficiary have access to prompt and certain payment should the underlying contract go wrong."**[own emphasis]

(13) A bank Guarantee is an autonomous contract which requires strict compliance to its terms. The Bank has no obligation to question the performance or otherwise of the obligations of the parties in the underlying contract.

(14) The only time a Bank may decline to honour a guarantee is where there is fraud or if payment of the guarantee would result in irretrievable harm to a party. No allegations of fraud were made in this case.

(15) The Plaintiff stated that it requested the Bank to hold off any payment under the guarantee as a **Civil suit No.31 of 2019** was pending determination in the Court. If this cited case had any bearing on the matter or affected the payment of the Guarantee nothing would have been easier than the Plaintiff seeking and obtaining relevant orders from the court. No such court order was served upon the Defendant Bank thus they had no basis upon which to decline payment of the guarantee.

(16) Refusing to grant such an injunction, **Roskill L.J Court of Appeal case HOWE RICHARDSON SCALE CO. LTD VS POLIMEX CEKOP [1978] 1 LLOYDS** Rep. 161 said:-

> **"The Bank in principle, is in a position not identical with but very similar to the position of a bank which has opened a confirmed irrevocable letter of credit whether the obligation arises out of a letter of credit or under a guarantee, <u>the obligation of the bank is to perform that which it is required to perform by that particular contract</u>, <u>and that obligation does not in any ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract</u>; the Bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen. The bank takes the view that the time has come and that it is compelled to pay; in my view it would be quite wrong for the Court to interfere with (2nd Defendants) apparent right under this guarantee to seek payment from the Bank, because to do so, would involve putting upon the bank an obligation to inquire whether or not there had been timeous performance of the seller's obligations under the sale contract."**[own emphasis]

(17) The wording of the Bank Guarantee dated **12th February 2018** at Clause 8 is as follows:-

> **"Notwithstanding anything herein contained, we confirm that we shall pay to you the amount guaranteed within 5 days of your demand thereof without cavil or argument, or any demand for any form of proof or substantiation from yourselves beyond your letter or demand."**

(18) The Defendant Bank received demands to pay **Vivo.** The Demands attached in the Replying Affidavit are for **kshs.13,500,000** and **Kshs.2,693,580.24**. From the attached account statement, it shows that indeed the Defendant Bank paid out the sums of **Kshs.2,693,580.24, Kshs.12,000,000/=** and **Kshs.13,500,000/=** from the Plaintiff's account to **Vivo** by way of a swift transfer.

(19) The Plaintiff argued that since there was an ongoing case between them and **Vivo**, it was not willing to pay until the case was heard and determined. The Plaintiff also argued that the Defendant did not inform the Plaintiff about the deductions before debiting their account and as such the Defendant was in breach of their Client/banker Agreement.

(20) In **CENTURY OIL TRADING COMPANY LTD –VS- KENYA SHELL LTD** (where **Mwera J** held:-

> **"The Plaintiff is trying to say in essence, if the Defendant makes a demand under the guarantee on the Bank, the bank should not perform as it bound itself to because a 3rd party has instigated such a breach to be committed by the bank. That will not do."**

(21) As a general proposition, a demand guarantee is independent of the primary Contract and will not be affected by dispute between the parties to the underlying transaction.Accordingly, I find that the Plaintiff/Applicant has failed to establish a prima facie case to warrant the grant of the injunctive orders sought.

(22) In the Further Affidavit dated **12th June 2019** the Plaintiff pleads that it stands to lose its secured property being **LR No. Naivasha/Mwichiringiri Block 4/289** measuring 1.25 Hectares as well as a motor vehicle Registration **KBY 992G** which the Plaintiff submits would subject the Plaintiff/Applicant irreparable loss. It is alleged that the Defendant Bank have engaged the services of an auctioneer to auction the Plaintiff's said properties. Firstly no evidence was availed in court to support the claims that the Defendant had already instructed an auctioneer in this regard. Secondly, the exercise of its statutory rights to sale by a bank is not an overnight event. The law provides that various legal notices must first be issued to the debtor. No such notice has been received by the Plaintiff. Thus the allegation that its properties are about to be sold is a misapprehension which has no basis.

(23) In the case of **Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR,** it was stated as follows:-

> **"The Second test for determination is whether the applicant will suffer irreparable loss. The following paragraph in Halsbury's Laws of England third Edition, Volume 21, paragraph 739, page 352 is instructive. It reads:-**
>
> **"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely todestroy the subject matter in question."**
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> **In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"? Robert Sharpe, in "Injunctions and specific Performance, Looseleaf, (Aura,, On Canada Law Book, 1992), P2-27" states that "irreparable harm has not been given a definition of universal application; its meaning takes shape in the context of each particular case."**[own emphasis]

(24) In **Palmy Company Limited Vs Consolidated Bank of Kenya [2014] eKLR**, **Justice Gikonyo** held as follows:-

> **"The Court held that damages are an adequate remedy as once a property is given as security, it becomes a commodity and it is subject to sale. Accordingly, in the unlikely event that the court finds in favour of the Plaintiff, the value of the charged property is ascertainable and any loss suffered by the Plaintiff's upon the sale of the same, is remediable by an award of damages.**

(25) The Plaintiff/Applicant cannot avail itself of the plea of irreparable loss. The propertiesin question were used to secure the bank facilities upto a certain amount. The value of said properties is ascertainable and in my view damages would amount to adequate compensation. On this ground also this application fails.

(26) Finally, I find no merit in the present application seeking injunctive orders. The amended Notice of Motion dated**24th April 2019**is hereby dismissed in its entirety. Costs are awarded to the Defendant/Respondent.

Dated in Nairobi this 9th day of June, 2020.

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Justice Maureen A. Odero