



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 223 OF 2018

MAIDEN LANE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

CHASE BANK KENYA (IN RECEIVERSHIP) LIMITED.....DEFENDANT

RULING

- 1) I had hoped that this matter would be amicably resolved. Indeed I encouraged the parties to do so but in vain.
- 2) Maiden Lane Investments Limited (Maiden) was desirous of obtaining a term loan of USD 1,200,000 from Chase Bank Kenya Limited (in receivership) (the Bank) and perfected certain securities in favour of the Bank. The arrangement fell through but the Bank insists that Maiden pays charges and costs incurred in the creation of the securities before discharging them. This aggrieves Maiden which attributes the failure of the arrangement to the Bank.
- 3) In the Plaintiff filed on 5th June 2018 Maiden seeks the following prayers against the Bank;
 - a) A declaration that the Plaintiff is under no obligation to make payments on account of legal fees and other costs for registering the Charge.
 - b) Release of Original Lease over Parcel Number L5-04 Lease being part of Land Reference 28867, Counterpart Charge and any other security documents in the Defendant's possession.
 - c) Discharge of Charge duly executed by the Defendant.
 - d) Compensation of loss of use and profit.
 - e) General damages
 - f) Interest on (b) & (c) above.
 - g) Costs of the suit.
- 4) In the meantime ,and on even date, Maiden filed a Motion seeking the following relief;
 1. THAT the Legal Charge in favour of Respondent/Defendant over Parcel Number L5-04 Lease being part of Land Reference 28867 for USD. 1,200,000 is void and of no effect.
 2. THAT the Applicant/Plaintiff is under no contractual obligation to make payments on account of legal fees and other costs to the Defendant for registering the Charge.
 3. THAT the Respondent/Defendant to discharge the Applicant/Plaintiff's Parcel Number L5-04 Lease being part of Land Reference 28867 and to deliver up to the Applicant/Plaintiff the Original Lease, Charge and other securities in respect thereof.

4. THAT the instrument of Personal Guarantee and Indemnity given by the Applicant/Plaintiff's directions for USD. 1,200,000 is null and void and the Applicant/Plaintiff's directors are released and discharged therefrom.

5. THAT the instrument of Corporate Guarantee and Indemnity given by Maxam Limited for USD.1,200,000 is null and void and the Applicant/Plaintiff's directors are released and discharged therefrom.

6. THAT the Court be pleased to issue any other order or further orders including an order for costs in favour of the Plaintiff/Applicant herein.

5) As is evident, to grant the prayers sought in the Motion will have the effect of determining a substantial part of the Claim and so the orders sought are really in the nature of a mandatory injunction. In that event the Applicant must get past the high threshold set for the grant of such order which has been restated by the Court of Appeal in Tom Onyango v Mimosa Investments Limited [2017] eKLR

“[11] The principles for granting mandatory injunctions at an interlocutory stage are not in dispute. It is the application of those principles in the context of the case which is in contention. As the authorities cited by the respective counsel show, a mandatory injunction may be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not be normally granted. It may be granted in clear cases where, *inter alia*, the court is satisfied that the matter ought to be decided at once or where the circumstances are such that the court is satisfied that the case is unusually strong and clear. In exceptional cases, the court has discretion to grant an interim relief although it amounts to granting the final relief itself prayed in the suit”.

6) I have heard the rival arguments made in the context of the pleadings and affidavits filed herein.

7) The two parties entered into a contract that is comprised of the letter of offer dated 11th August 2015. Under the terms of that letter the following securities were to be taken;

a) First Legal Charge over properly Parcel Number L5-04 and Parcel Number L5-05 on Land Reference Number 28867 in Tatu City in the names of Maiden Lane Investments Limited for USD.1,200,000 (United States Dollars One Million Two Hundred Thousand Only).

b) Corporate Guarantee and Indemnity from Maxam Limited for USD.1,200,000 (United States Dollars One Million Two Hundred Thousand Only).

c) Personal Guarantee and Indemnity from each of the Directors of Maiden Lane Investments Limited namely Ngugi Kiuna and Gachao Kiuna for an amount of USD.1,200,000 (United States Dollars One Million Two Hundred Thousand Only).

8) It is common cause that the Corporate and Personal Guarantees were taken and a charge over parcel L5-04 registered. In the charge document it is explicit that all costs, taxes and expenses incurred by the Bank in relation to the security was to the account of the borrower (see clause 4 of the Charge document). Indeed, Maiden may have understood its obligation to pay fees for the perfection of not only the charge but all other securities. This can be inferred in its promise of 18th January 2016 to settle the fee note of Ksh 1,276,097.00 raised by the firm of A.F. Gross.

9) But as I understand it, Maiden does not contest its obligation to meet those charges, rather that it is not obligated to do so because the Bank failed to meet its side of the bargain by failing to disburse the facility for which the securities were taken.

10) The Bank on the other hand defends its stance. First, that a legal charge was not taken over parcel L5-05 and so securities were incomplete. Second, that the Borrower did not respond to certain issues raised by the Bank in its letter of 14th March 2016 which is reproduced below;

The Directors,

Maiden Lane Investments Limited

Date: 14th March 2016

Attn: Ngugi Kiuna

Re: Maiden Lane Investments Limited

We acknowledge receipt of the USD 1.2M reimbursement request evidence of the payment made to the vendor for the purchase of the two parcels of land in Tatu City i.e No. L3- 04 and L5-05 on LR No. 28867.

The facility approval was granted on the basis that the source of repayment and guarantor will be Maxam Limited (trading company and guarantor) which wholly owns Maiden Lane.

We have received information that Maxam Limited and the two related distributors in Tanzania and Uganda have received contract termination notices from Heineken. In view of the new development and prior to the facility drawn down sought, kindly address the

following queries:

Ø In the event the Heineken contract is terminated and not renewed, what will the company use the newly acquired parcels of land in Tatu City for noting that the intention was to build warehouse and offices to facilitate the storage and distribution of Heineken.

Ø We have obtained information that Maxam Limited will seek financial compensation in the event of contract termination and failure to renew the same. Kindly clarify on the compensation details.

Ø If the contract is renewed on the basis that distribution exclusivity is removed, what impact will this have on the business?

Ø We note that Maxam Limited is also a distributor of other products i.e Marlboro; Aquila Vodka and Pernod Ricard. Kindly confirm the percentage of the turnover each product accounts for. In case the Heineken contract is not renewed, we seek to establish that the turnover generated from the sale of the other products will be sufficient to cover the loan repayment, operational expenses and remain profitable.

Ø In addition to the above, we kindly request for the audited accounts for 2014, 2015 and the latest management accounts to update our records.

We look forward to hearing from you on the above as this will assist us in the pending drawdown request. Kindly keep us apprised on the court case outcome.

Thank you for your continued business support.

Yours faithfully,

For: Chase Bank (Kenya) Limited

Victor Ngari

Senior Relationship Officer

Corporate Banking

11) For sure, a condition precedent to the Bank availing the facility was, inter alia, execution of all security documents which included that over L5-05(clause 7 of letter of offer). And one collateral was registration of the charge over this property. From the evidence before me this has not been done. What is less clear and could be a matter for trial is why that has not happened. Without clarity on the matter I am unable to make the call that the Bank is in breach of its obligations to disburse the facility.

12) In regard to the inquiries raised in the letter of 14th March 2016, the Bank argues that they were necessary as the substratum of the entire arrangement was that the source of repayment of the loan would be Maxam Limited which wholly owns Maiden. In this regard warehouses that were to be built by Maiden were to be hired by Maxam for storage and distribution of Heineken products. And having become aware that Maxam had received a termination notice in regard to the Heineken contract, the Bank was entitled to raise the queries.

13) Again, as a condition precedent to the drawdown, the Borrower was obliged to furnish to the Bank any other documentation requested by the Bank (Clause 7(V) of the letter of offer). While this condition should not be abused by the Bank simply to obstruct a drawdown, there will be occasion when a request is reasonable. In the letter under contention, the Bank requests for certain information and documents. I would think that it is the remit of the Trial Court to determine whether the Bank was justified not only in making the inquiries but also in withholding the facility. Yet for now, at this interlocutory session, I am not sufficiently assured that the Bank's stand was needless as to grant the mandatory orders sought.

14) As would now be clear, this Court is not inclined to grant the orders sought on the Notice of Motion dated 4th June 2018, it is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 8th Day of November 2019.

F. TUIYOTT

JUDGE

PRESENT:

Katwa for Ahmed for Defendant

No Appearance for Plaintiff

