REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 107 OF 2018

1. JUJA COFFEE EXPORTERS LIMITED

2. T.S.S. INVESTMENTS LIMITED.....PLAINTIFFS

VERSUS

1. N.I.C. BANK LIMITED

2. KAAB INVESTMENTS LIMITED.....DEFENDANTS

R U L I N G

1. The disputes between the plaintiffs here and the defendants and other parties are broadening, becoming confusing and not portending well for the administration of justice in the courts if the sheer number of suits is anything to take as an indicator. Both plaintiffs and the 2nd defendant seem to have a connection which has remained obscured, once again from the litigation revealed in borrowings from different banks which have found their way into the courts.

2. In this suit the core of the dispute is pleaded to be that the plaintiffs did not seek nor obtain any facility or accommodation from the 1st defendant but that by way of fraud committed against them by the defendants and one Aweys Mohammed, their parcels of land were charged to secure the advances and accommodation afforded to the 2nd defendant.

3. Prior to this suit, there had been **HCC No. 74 of 2016 TSS Investment vs NIC Bank Ltd** and **ELC No. 142 of 2017 Juja Coffee Exporters Ltd vs NIC Bank.** The positions of the two cases were indeed pleaded and employed by both sides in their respective stand points.

4. While the plaintiff contends that the creation of the securities was tainted and vitiated by impropriety in the nature of fraud the defendant took the position that there was no improper acts on its part as none of its staff had been arrested or charged just as there was no evidence that the plaintiffs had lodge a criminal complaint against the creation of the securities. In addition it was contended that the suit is abusive of the court process because of the issue having been decided in the prior suits and that the debt had been admitted.

5. Those opposing stand points led to the filing of two applications by both sides. The plaintiff application is dated 28/112018 seeking injunction pending suit while the defendants application is dated 3/11/2018 seeking orders that the interim temporary injunction granted on the 9/11/2018 be set aside for having been granted on account of non-disclosure or just concealment of material facts.

6. On 11/12/2018, the court gave directions that the two applications be heard together after parties filed written submissions. Indeed the two sides filed respective submissions. The plaintiff submissions are dated 9/4/2019 and filed on 10/4/2019 together with a list of two authorities of the same dates. The defendant's submissions are dated and filed on 24/4/2019 together with a list of some 11 authorities.

7. The rationale of directing the two applications to be heard together was because the defendant application is essentially an opposition to the plaintiff's application and in fact would be spent the moment the plaintiffs application is heard inter-partes and a decision rendered. I will thus proceed on the understanding that a determination of the plaintiff's application one way or the other will determine the defendant's application either way.

Application for injunction by the plaintiff

8. The backgrounds facts disclosed in the application are to the effect that the true facts of the case were not known to them till the 1st respondent filed responses in the two previous suit and after the said documents were subjected to scrutiny when it was revealed that there was no advances made to the plaintiff and that a forensic examination of the documents revealed that the plaintiffs did not execute the

security documents which were thus procured by fraud. It was pointed out that the letter of offer dated 10/12/2014 was never signed by the 2nd plaintiff while the signatories appearing on the other letters when subjected to document examination returned a verdict that the same was a forgery. The plaintiffs contend that the signatories in all legal charge documents when subject to forensic examination turned out to be forgeries. It was then concluded that there is doubt as to the legality and validity of the charge instruments and that if not legal then the same cannot be the basis of a statutory power of sale.

9. Several documents were exhibited to prove the plaintiffs complaints including forensic examination report of several documents said to have been executed between the parties including pleadings filed in Nairobi in a suit between the 1st plaintiff and standard chartered bank and a suit between the 1st plaintiff and National Bank of Kenya Ltd.

10. The Application was opposed by the Affidavit of Stephen Atenya, a Senior Legal Manager of the 1st defendant. His position was that from the documents in the possession of the 1st defendant, it, in the year 2014, advanced to the 2nd plaintiff a facility in the sum of USD 16,200,000 intended to take over the borrowing of the plaintiff from Standard Chartered Bank and I &M Bank Ltd and the two banks were indeed paid off. It was additionally contended that in the year 2015 the said defendant advanced to the plaintiff USD 18,000,000 intended for the plaintiff's working capital and take-over of the indebtedness to Standard Chartered Bank and the same was secured by LR No. 5207 Section 1 MN together with Mbs/Block XX/95 which payment was acknowledged by the Standard Bank in its suit in Nairobi.

11. It was then contended and asserted that upon execution of the legal charges the letters were superseded and that all the plaintiffs' directors were duly aware of the take-over arrangement and did append signatures to the offer letters, resolutions to borrow and the charge instruments were indeed executed before an advocate who certified having witnesses such signatories hence the legal charges are valid and indeed enforceable.

12. On the request for documents, the same were said to have either been available by the plaintiff or were nonexistent but that the statements of accounts were available for collection upon request. The document examiners report was said to be inaccurate for making reference to non-existent letters of offer and of no probative value in these proceedings and that the 1st defendant was a stranger to the allegations of fraud, as it was never privy to the day-to-day operations of the plaintiffs.

13. The defendant then contended that the current suit was an abuse of the court process having been filed after and while ELC No. 142 of 2017 and HCC 74 of 2016 were pending over the same subject matter and while orders had issued in those two files. To the defendant, the plaintiffs' loss if any could be compensated by an award of damages. The plaint was said to reveal no cause of action, was an abuse of the court process and could not thus attract an order of temporary injunction. Court was urged to note that the debt due from the plaintiffs was colossal in the sum of Kshs.983,579,441.07 and USD 35,295,137.83 respectively as at 23/10/2019.

14. With the leave of the court, the plaintiff filed a supplementary affidavit on the 4/3/2019 purposed to respond to the Replying Affidavit. The first response is that the letter of offer marked **Tss10** was erroneously stated to have been dated 16/10/2014 when it was actually dated 2/10/2014 and was the same letter made reference to in the Replying Affidavit at page 127 to 144. The plaintiff thus contended that it was factually wrong for the 1st defendant to allege the letter to be non-existent just like the charge dated 22/8/2014 is also alleged to be non-existent when the defendant has annexed it as **SA1**. All the annextures to the forensic report and various documents referred to where the signatories are shown not to belong to the deponent of the supplementary Affidavit. On the documents sought and said to be in the plaintiff's possession, the deponent asserted that no meeting was ever held to yield resolutions to authorize borrowings.

15. Parties equally filed submissions in canvassing the Applications and the respective submissions in fact refer to the two Applications.

16. The Defendants application on its side is founded on the fact that the orders issued by the court on 29/11/2018 were in violation of order 40 Rule 4 and that the orders were issued out of concealment of the fact that the suit property in this suit were the same being litigated over in Mombasa HCC No. 74 of 2016 and ELC No. 142 of 2017. It was pointed out that in HCC No. 74 of 2016 an injunction had been granted pending service of statutory notices while in ELC No. 142 of 2017, the court had ordered the plaintiffs to pay to the defendant at least 2% of the outstanding debt beginning 10th of every month commencing June 2018. The defendant contended that the said orders had not been complied with and the plaintiff did not disclose same before seeking the orders of 29/11/2018 hence the plaintiff was merely abusing the court process. That application by the defendant was opposed by the Affidavit sworn on plaintiff's behalf by TAUHIDA TAHIR SHEIKH SAID.

17. In that affidavit the deponent contended that the orders given on 29/11/2018 were *ex-parte* and intended to last no more than 14 days being the reason the application was fixed on the 11/12/2018. It was then contended that the cause of action in this suit being grounded upon fraud evidenced by Forensic report had not been the subject of the previous suit. It was then submitted that the court is not expected to turn a blind eye to the very serious allegation of fraud as pleaded.

18. As said before, the two counsel filed submissions in urging respective positions. The plaintiff's submissions are dated 9/4/2019 together with a list of authorities dated 10/12/2018 and a supplementary list of authorities dated 9/4/2019. For the defendant, the submissions and list of authorities are both dated 24/4/2019.

19. In the submissions, the plaintiffs take the view that on the fact of alleged fraud they had established a prima facie case that was so deep in ramifications that and could not be defected by a plea of res judicata. The decision in **Robert Muga vs Muchangi Kiunga [2007]eKLR** was cited for that position. It was then submitted that the plea of fraud, forgery and collusion alleged against the defendants and the forensic report exhibited, there was prima facie dispute that demanded to be investigated by the court and that the same could only see the light of day if an injunction was granted to preserve the subject matter of litigation. It was equally submitted that the way the letter of offer explained the process of pre-and post-shipment financing, it was unimaginable that a whopping USD17,500,000 would be disbursed without a single document being cited. The fact that the due execution of the letters of offer and legal charges had been cast in doubt by the forensic report was underscored to show that there was a matter that was not frivolous.

20. The decision in ***Arthi Highway Developers Ltd vs West End Butchery Ltd [2015]*** was cited for the position that a fraudulent deed could not ground any right. The decisions in **Irene *C. Chumo vs David Rugut [2009] eKLR*, *Solai Ruiyobei Farm Ltd vs Phillip Cheptumo [2016]*** and ***Elija Kipngeno Arpa Bei vs Peter Kipyegon Rotich [2015]*** were all cited for the holding that were fraud is pleaded it cannot be dealt with summarily at an interlocutory stage but must be adjudicated upon at the full hearing. ***Mbuthia vs Jumba Jimba Credit Finance Corporation & another[1988] eKLR*** was cited for the proposition that whether a chargee had exercised his rights fraudulently was a matter for determination upon evidence while the Ugandan decision in ***Inid Tumwebaze vs Mpwere Stephen HCT -05-CV-CA 0039 -2010*** was cited for the proposition that if the plaintiff shows that there was fraudulent dealing by the charge the court would have to investigate such allegations and that a court of law cannot sanction an illegality which overrides all pleadings and any admission made pursuant thereto.

21. Based on the foundation of fraud the plaintiff submitted that breach of the law was sufficient of irreparable loss and therefore the decision in ***Thomas Smith Aikman,allan Malloy 7 other vs Muchoki [1982] eKLR*** and ***Sharok Kher Mohamed Ali vs Southern Credit Banking Corporation (2008)eKLR*** *were* cited to court for such proposition. Lastly on the point of irreparable loss the plaintiff cited. ***Peter Kimani Nawe vs Kenya Commercial Bank [2016] eKLR*** where the Court of Appeal held that except in very clear cases loss of land cannot be adequately compensated by way of damages. The same decision was cited for the proposition that where there is threat to sale of a property the balance of convenience tilts in the plaintiffs favour as the sale involves deprivation of property.

22. On whether there had been concealment or no-disclosure of material facts, the plaintiff cited to court the decision in ***Mary Wairimu vs Republic & 3 Others*** where the court defined material fact to be of the nature whose knowledge would affect the decision making process.

23. On whether the order for production of documents should be made, submission were made to the effect that on the sheer amount of the sums involved, the court could only do justice to the parties if all relevant documents were produced. On those submissions it was urged that the application for injunction was merited and should be allowed.

24. For the defendant submission were offered whose theme was that the plaintiff had not satisfied the criteria for grant by a temporary injunction and that the interim orders were irregular and deserve being discharged and set aside as of course.

25. It was urged that in 2014 the 1st defendant advanced to one TSS Grain Millers, not a party here, some **USD 16,200,000** purposed to take over the liabilities owed, to Standard Chartered Bank and I & M Bank Ltd and was secured by the charge instrument dated 22/8/2014 and the two banks were thus paid by the 1st defendant. Again in 2015, another advance of USD 18,000,000 was made once again for the purposes of taking over the liabilities owed to standard Chartered Bank and for working capital of the 1st plaintiff and the same was secured by an instrument of charge dated 12.3.2015. The 1st defendant maintains that the plaintiffs failed to service the loans in terms of the lending contracts and as at 23/01/2019 the sums outstanding on the accounts were Kshs.983,597,441.07 and USD 35,295,137.83.

26. On account of default the 1st defendant sought to exercise its statutory right of sale which triggered the filling of two previous suits; HCC No. 74/2016 and ELCC No. 142/2017 in which the court has made orders dismissing the latter suit and later granted orders of injunction pending appeal on conditions which conditions the plaintiff has never complied with leading to the property being advertised for sale which was later stalled by the orders issued herein. The decision in ***DPP vs Justice Mwendwa Kangethe [2016] eKLR*** was cited for the proposition of the law that the need and rationale of order 40 Rule 4 was designed to curtain abuse of interim injunctive reliefs.

27. On the merits of the application, the defendant offered submissions that no prima facie case could be disclosed when the debt had been admitted and two previous suits having been filed and still pending. To the defendant this was outrightly an abuse of the court process. It was submitted that an applicant needed to establish a prima facie case which as defined in **Nguruman vs Jan Bonde Nielsen (2014),eKLR** was a case more than a merely arguable case but demonstrates an infringed right and a probability of success. On that point the defendant contends that one of the issues for consideration must be whether the right to sell has accrued. It was then underscored that indeed money was advanced and disbursed on securities of the suit property and there having been a default to pay, the right to sell has accrued and therefore there is no prima facie case disclosed. The outstanding debt was thus disclosed in not very modest figures.

28. The defendant then underscored the fact that there had been filed two previous suits concerning the same property and that this suit was bad for being *sub-judice* under Section 6 of the Civil Procedure Act. The defendant then cited to court the decisions in ***Republic vs Registrar of societies-Kenya (2017)eKLR, Balmy Company Ltd vs Consolidated Bank of Kenya Ltd (2014)eKLR*** *and* ***Peter Njuguna Njenga Vs equity Bank Ltd(2014)eKLR ,*** on the application of the *sub-judice* rule and the prerequisites of the rule and on the principle of equity that demands that only those with clean hands get aided by equity. It was reiterated that despite express orders by the court the plaintiffs failed to comply and thus became undeserving of the remedy of an injunction. To buttress the position that failure to comply with court orders disentitles the plaintiff to the injunction sought the defendant cited the decisions in ***Hunker Trading Company ltd Vs Elf Oil Kenya Ltd(2010)eKLR*** *and* ***Patrick C Tindi vs HFCK (2011)eKLR*** for the proposition of law that a litigant cannot get an injunction a second time having failed to comply and fulfill the terms of an earlier injunction.

29. On irreparable injury, the defendant revisited the decision in **Nguruman (supra)** for the proposition that injunctions issues to prevent grave and irreparable actual, substantial and demonstrable injury rather than speculative injury. Taking into account the sum outstanding on the account, the defendant termed it colossal and submitted that it tilts the balance of convenience in favour of the injunction being refused.

30. in response to the plaintiff's submissions on the pleaded forgery and or fraud, the defendant pointed out that the same are criminal in nature and not due for litigation before this court and in this file. That notwithstanding, the defendant pointed out that nothing had been put forth to connect it with the alleged impropriety and that even though the charge instruments were signed by two directors, one signature id disputed. The decision by the court of appeal in bi ***Zakayo Kibuange Vs Lidya kaguna (2014)eKLR*** was cited for the proposition that in such situations the right thing for a litigant to do is to report the matter to police for investigations rather than sitting tight and inviting the opponent to prove that he indeed signed the document. On the forensic document examiners report the same was termed inaccurate and that it had not been properly produced. ***Kenneth Nyaga Mwige Vs Austine Kiguta (2015)eKLR*** was cited for the proposition that a document becomes proved only when the court applies its judicial mind to it at the final hearing of the case. The other element of fraud said to be evidenced by a debit of some 53 million contrary to the letter of offer dated 27.10.2014 was explained to have been covered by other letters of offer.

31. on whether the prayer for documents merited being granted , the defendant reiterated his depositions in the affidavit that the same documents were to be furnished by the plaintiffs and the borrower, were thus within the plaintiffs' reach, while the offer letter dated28.11.2018 did not exist while the bank statements were available for collection on request and upon payment of requisite charges.

32. Having perused the papers filed together with written submissions as highlighted by counsel, I have come to the conclusion that I must determine whether the plaintiff has demonstrated a case that deserves being preserved for hearing by production of evidence or if the plaintiffs' complaint is an ingenious and vain allegation disguised as a cause disclosing no cause of action and demonstrating abuse of the court process. While undertaking that task I will stand reminded that there is that very serious charge against the plaintiffs that their cause is an afterthought and that it affronts Section 6 of the Civil Procedure Act. The question of sub-*judice* is to me a threshold matter and must be dealt with before one delves into the merits. Indeed it is beyond denial that HCC 74 of 2016 and ELCC No. 142 of 2017 were indeed filed before this matter and that there are orders issued in those suits which the plaintiffs have not complied with. However, the foundation of the suit before me is an alleged fraud and forgery regarding the creation of the securities the defendant intends to enforce. That issue, even though the subject property be the same, was never live in the previous suits. The reason given for not having been pleaded is that the documents were only availed to the plaintiffs by responses in those earlier suits. That assertion and the cause pleaded when coupled with the pursuit for further documents even in this suits persuades me that the plaintiffs needs their day in court. I do find that the cause pleaded here has never been canvassed between the parties and is not *res sub-judice.*

33. The other reason I have posed for myself if whether the court can freely and consciously shut its eyes and fold its hands at the back and chose to ignore an allegation leading to prospects that securities purposed to secure the very colossal sum of money subject of the suit may be tainted with impropriety. I understand the primary purpose of any judicial system to be designed to ensure fidelity to the law by enforcing the rule of the law. Where the allegation is that the law is being affronted, it must interest the court to do its mandate-investigate and render a judicious determination. In this matter, if I was to strike out the matter on account of the position taken by the defendant, I would leave the dispute undetermined and the allegation of fraud uninvestigated. Such an approach would depict a failure on the mandate upon the court. In ***Robert M Muga vs Muchangi Kiunga (supra)*** the court of appeal was emphatic that fraud vitiates all including court proceedings and that where such is pleaded, the defendant cannot be heard to mount a bulwark by defence of res judicata to forestall the fraud from being investigated. Here I am guided and fully persuaded that both sections 6 & 7 of civil Procedure Act do not bar the plaintiffs' suit.

34. On the merits, while I must determine if the plaintiff suit presents a prima facie case, that endevour, must not assume the place of trial [1]. One must resist making determinative findings at an interlocutory stage to obviate prospect of prejudicing the trial when evidence is led. Accordingly, at this juncture my task is to assess the strength of the plaintiff case[2] as pleaded without having to be convinced that the cause as pleaded must succeed after trial. It is enough that I see prospects of success when evidence is led.

35. In resisting the plaintiff prayer for injunction, the defendant has urged very forcefully while relying on the decision in Nguruman's case (Supra). The position taken is that no prima facie case has been made out. What I get from that decision is a reiteration of the law that this court must hesitate from straying into the area demarcated for trial. That is what I get in this sentence by the court:-

> ***"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."***

36. Being so guided, this is not the forum to find if the forensic document examiners report is accurate or properly produced as submitted by the defendant. It is enough if I form the view that there could be some prospects of the validity of the charge instruments being successfully challenged. That I hold the view has been established. It is not that I am bound by the opinion of the expert. No. I am saying that even at this early juncture it is of interest to court to get the opportunity to investigate if the plaintiffs or in deed any of them did participate at the creation of the securities. That is a matter that goes to the propriety and legality of the same securities which cannot be glossed over. Before it is addressed it is only reasonable that the intended sale be stopped. On the basis that the legality of the charges grounding the statutory power of sale has been brought to challenge, I do grant a temporary injunction to restrain the sale of the suit [property pending the determination of the suit but on terms that the plaintiffs move expeditiously to have the suit heard.

37. On the prayer for supply of the document, I consider that to be a facilitating order that would obviate prospects of other interlocutory application. While the defendant contends that some of the documents sought were to come from the plaintiffs and the borrower, it has not been denied that the documents are within its possession or control. The other contention is that the letter of offer sought does not exist on account of dating.

38. The dispute here axiomatically rotates around the document of security and their creation and cannot possibly be outside the control of the defendant. I see no prejudice that would await the defendant if it availed the same to enable the suit be fast tracked. I adopt the words of the court of appeal in **Barclays bank of Kenya ltd vs Christopher Kenyariri** and say that on the fact of this case justice requires that the plaintiffs should be put in possession of all the documents in possession of the defendant and connected with the creation of the legal charges and the and the account on such facility. That be done within 30 days from today so that the date set for case conference is not disturbed.

39. In the end I do allow the plaintiffs' application in terms of prayers 3 and 4 and direct that costs be in the cause. Having allowed the application by the plaintiff the 1st defendant's application stands dismissed also with costs being in the cause.

Dated, **signed** and **delivered** at **Mombasa** this **10th December 2019.**

P J O Otieno

Judge

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[1] Per omolo JA in *National Bank of Kenya vs. Duncan Owour Shakali & Another, CA NO. 9 of 1997*

> ***All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."***

[2] *Per court of Appeal in Habib Bank Ag Zurich vs. Eugene Marion Yakub, CA NO. 43 of 1982*