



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E102 OF 2019

ZINGO INVESTMENT LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Through the application dated 24th April 2019, the Plaintiff/Applicant herein, Zingo Investment Limited, seeks the following orders:

a) Spent.

b) Spent.

c) THAT pending the hearing and determination of this suit an order of injunction do issue restraining the Defendant either by itself, employees, servants or agents from levying and/or further levying and/or imposing illegal and/or contractual debits or charges upon the Plaintiff's Kenya shillings and Dollar Accounts under its management.

d) THAT pending the hearing and determination of this suit an order of mandatory injunction do issue directing the Defendant either by itself, employees, servants or agents to pay to the Plaintiff or credit the Plaintiffs Dollar and Kenya Shillings Accounts with the sum of USD 31,235.33 and Kshs. 9,945,135.69 respectively together with such amounts constituting interest accrued on the stated sums calculated at the prevailing commercial rates as from 4th January 2019 until full payment or such a time as credit is effected into the said accounts.

e) THAT the costs of this Application be provided for.

2. The application is supported by the affidavit of the applicant's Managing Director **Mr. ROBERT NJOKA MUTHARA** sworn on 26th April 2019. A summary of the Plaintiff's case is that it obtained financial facilities from the Defendant which were secured vide the following instruments:

i. Charge for USD 882,354 over L.R. Nos. 209/8628.

ii. Charge for USD 2,238,000.00 over LR No. 9363/98.

iii. Floating Debenture for a maximum principal amount of USD 794,000.

iv. Joint and several guarantees of USD 3,476,000.00 by the directors of the Plaintiff.

3. The plaintiff claims that the Defendant failed to perform its obligations under the loan agreement by, *inter alia*, failing and/or neglecting to facilitate payments expected from the Plaintiff's customers thus resulting in the collapse of the Plaintiff's business and a loss in excess of USD 10,898,920.00. The plaintiff claims that notwithstanding the Defendant's said breach, the Defendant proceeded to unilaterally intimate its intention to convert the facilities denominated in US Dollars into Kenya Shillings with effect from 23rd June 2016 and to increase interest from about 8% to 22.5 %.

4. The dispute between the parties culminated in the filing of HCCC No. 227 of 2016; **Zingo Investment Ltd v National Bank of (K) Ltd**

(hereinafter “**the earlier suit**”) which suit was subsequently compromised through a consent dated 20th December 2017. It is the Plaintiff’s case that, as part of the settlement terms, the Plaintiff’s loan facilities were consolidated and restructured thereby bringing the total indebtedness to USD 5,666,000.00 after which the Defendant agreed to advance, to the Plaintiff, an additional working capital of USD 1,100,000.00.

5. The Plaintiff claims that the resolution of the earlier suit was informed by the mutual appreciation and acknowledgement of the fact that there was an outstanding loan facility to be settled and the fact that the Plaintiff had suffered colossal losses owing to Defendant’s failure to optimally facilitate its business including facilitating payments through Letters of Credit. According to the Plaintiff, there was consensus that a resumption of business and normal relations was necessary in the interest of both parties.

6. The Plaintiff further contends that the Defendant was at all material times aware of the intended purpose of the additional facility of USD 1,100,000.00 and was therefore aware that failure to avail the funds to the Plaintiff would occasion unwarranted loss. The Plaintiff alleges that it later learnt that the Defendant had deliberately and/maliciously debited its accounts with illegal and/or unlawful entries/charges. It is further alleged that the Defendant unilaterally and secretly opened accounts in the name of the Plaintiff and debited the same with unexplained and/or unwarranted charges. It is the Plaintiff’s contention that despite its numerous complaints over the issue of unlawful debits, the Defendant did not made good the Plaintiff’s case which it has countered with incoherent and illogical explanations.

7. The Plaintiff further states that despite approving a working capital of USD 1,100,000.00 that was intended to enable it get back to business and meet its obligation towards repayment of the loan facilities, the Defendant deliberately misapplied, diverted and /or applied part of the funds towards addressing illegal and unmerited charges/debits with the net effect that the Plaintiff has been denied the benefit of close to 20% of the Approved working Capital.

8. The Plaintiff contends that the Defendant’s actions have prevented it from servicing its obligations under the Contracts already signed with its customers which contracts have suffered termination as a direct consequence of the inability by the Plaintiff to fulfil the contracts.

9. It is the Plaintiff’s contention that the actions by the Defendant are prejudicial to the Plaintiff’s interest and are a blatant derogation from clear terms of their agreement. The Plaintiff contends that unless the orders sought herein are granted, the above actions will cause it irreparable loss, prejudice and damage which cannot be compensated by way of damages.

10. The Defendant opposed the application through the Grounds of Opposition dated 20th June 2019 in which it listed the following grounds:

- 1. The application is frivolous scandalous and an abuse of the Court process.***
- 2. The Applicant is a perennial defaulter trapped in debt and is seeking justification to vex the Defendant.***
- 3. The Plaintiff is unable to service its loan with the Defendant despite being granted additional capital to revive its business.***
- 4. There are no illegal debits/entries in the Plaintiff’s account the debits reflect debt admitted by the Plaintiff to the Defendant.***
- 5. The matters raised in the suit are res judicata.***
- 6. The Plaintiff is in default of loan repayments and has diverted its banking to other financial institutions.***
- 7. The Plaintiff has come to a Court of Equity with unclean hands.***

11. The Defendant also opposed the application through the Replying affidavit of its Recovery Manager – Corporate **CHRISTOPHER MARWA** who avers that the Applicant’s supporting affidavit is an exact replica of the supporting affidavit sworn by the same deponent on 14th June 2016 in support of the Notice of Motion dated 14th June 2016 in the earlier suit which motion was dismissed by Hon. Justice F. Tuiyott on 15th June 2017. A copy of the ruling is exhibited in the replying affidavit as annexure marked “**CM 2**”. He admits that the earlier suit was compromised, subject to the Banking Facilities Letter of Offer to the Plaintiff, but that no award of damages was made to the Plaintiff and further, that the loan restructure does not mention the Plaintiffs alleged losses.

12. It is the Defendant’s position that the letter of offer dated 27th November 2017 speaks for itself and the alleged claim of USD.10,898,920 was not the subject of the letter and/or the settlement consent. He further states that the Plaintiff was required, under the letter of restructure, to among other things, sell L.R. No. 209/8626, subdivide 1.75 acres of L.R. No. 9363/98 and apply proceeds therefrom to reduce the original debt, pay arrangement fee of USD.15,000 on execution of the offer letter and provide supplemental debenture and charge to cover the entire debt. He states that the Plaintiff however failed to sell the property which sale aborted after a deposit of Kshs.500,000/- was paid to the Defendant and further, that the Plaintiff failed to pay USD.15,000 as required. He contends that the Plaintiff acknowledged non-compliance with the letter of restructure and wrote to the Defendant to that effect on 1st June 2018. A copy of the said letter is annexed to the replying affidavit and marked “**CM 3**”.

13. He avers that the Plaintiff has been looking for ways and means to avoid repaying the loan owed to the Defendant and adds that the Defendant was not aware of the breakdown of how the Plaintiff intended to use the funds until it received its letter dated 11th December 2018. He further avers that the Plaintiff failed to comply with terms and conditions spelt out in the restructure letter of 22nd November 2017. It is the Defendant’s case that the Plaintiff is a perennial defaulter of its financial obligations and that it has nothing to do with the Plaintiff’s dealings the alleged customers.

14. He states that through a letter dated 25th March 2019 the Defendant outlined how the funds were applied during drawdown and that due

to the accrued interest over the period when the restructure was approved until the time it was drawn, the restructured facility of USD 5,666,000 did not accommodate the initial legal fee of Kshs. **7,849,881.00** and the outstanding balance for Insurance Premium facility of Kshs. **1,545,254.69**. He further explains, in detail, the transactions that were effected in the Plaintiff's accounts, following the loan restructure and the circumstances that led to the opening of Dollar account no. 02020061333500 on 3rd September 2013.

15. Parties filed written submissions to the application which I have carefully considered. The main issue for determination is whether the Plaintiff has made out a case for the granting of the orders of injunction sought in the application.

16. The principles governing the granting of interim orders of injunction are well settled. The said principles were set out in the case of **Giella v Cassman Brown & Company Ltd** [1973] EA 353 and restated, together with their mode of application in **Nguruman Limited v Jan Bonde Nielsen & 2 Others**, CA No. 77 Of 2012, 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

(c) allay 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. I will now turn to consider if the application meets the threshold set for the granting of temporary orders of injunction.

Prima facie case

18. It is well established that, in order to secure an injunctive relief the applicant must first establish a prima facie case with a high chance of success. The Court of Appeal pronounced itself on what constitutes to a prima facie case in **Mrao Ltd v First American Bank of Kenya and 2 others** [2003] KLR 125 as follows:-

“A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

19. I am alive to the fact that at this stage, I am not determining the main suit and my role is to determine whether the applicant has established a *prima facie* case against the Respondents so as to qualify for the orders sought in the application under consideration. In determining whether the plaintiffs have established a prima facie case, it is necessary to examine the law, the pleadings filed herein and the arguments advanced by both parties.

20. It is not disputed that the plaintiff obtained certain loan facilities from the defendant and that the plaintiff has been experiencing challenges in keeping up with the loan repayments, a scenario which led to the filing of the earlier case that was later compromised. The terms of the said compromise included the restructuring of the initial loan and a further advance of loan facility in order to inject more capital into the plaintiff's business. The plaintiff's case, as I understand it, is that the defendant misapplied, diverted and/or applied part of the funds towards addressing illegal and unmerited charges/debits with the net effect that it has been denied the benefit of close to 20% of the Approved working Capital. The Plaintiff further claims that the Defendant's actions have hampered its ability to fulfil its obligations under the Contracts already signed with its customers which contracts have suffered termination as a direct consequence of the inability by the Plaintiff to fulfil the contracts. In a nutshell, the plaintiff blames the defendant for its inability to effectively continue with its business in order to fulfil its financial obligations.

21. My finding is that the issue of whether or not the defendant is responsible for the plaintiff's financial woes is an issue which can only be determined after the hearing of the main suit. This issue does not take away the fact that the plaintiff was before and even after the restructuring of the loan, indebted to the defendant.

22. I find that at the center of the present application is the dispute as to the amount due and the interest charged by the defendant on the loan facility that it advanced to the plaintiff. The question that arises is whether these issues would warrant the granting of orders of injunction. Courts have taken the position that they will not grant injunction under such circumstances. In **Fina Bank Ltd v Ronak Ltd** (2001) 1 EA 54 (CAK) the Court of Appeal held;

“As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right

to charge interest at variable rates its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis.”

23. Similarly, in *Pelican Investments Ltd v National Bank Of Kenya Ltd*, [2000] 2 EA 488 (CCK), it was held:-

“Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest.....In any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction.”

24. In *Shah v Shah* (1965) EA 91 it was held that:-

“An injunction restraining a mortgagee from exercising his power of sale can be granted very rarely if the dispute is only as to the amount of interest”.

25. Again in *Sports Cars Ltd v Trust Bank Ltd*, Case No 754 of 1999, the court held that:-

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute or because the mortgagor has begun redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the Mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due, unless on terms of the mortgage, the claim is excessive”.

26. Applying the above principles to the present case, I find that the issue of the amount due to the defendant and the interest chargeable are issues that are governed by the terms of the contract between the parties and which the court cannot interfere with at this interlocutory stage.

27. The plaintiff also sought orders for mandatory injunction directing the Defendant to credit the Plaintiffs Dollar and Kenya Shillings Accounts with the sum of USD 31,235.33 and Kshs. 9,945,135.69 respectively. Whereas in the case of prohibitory injunction an applicant must establish *prima facie* case with a probability of success, that the applicant will suffer irreparable damage which cannot be adequately compensated by an award of damages if an injunction is not granted or further still, that the balance of convenience tilts in the applicant's favour. In the case of mandatory injunction, the applicant must in addition establish special circumstances and the standard for its grant is usually higher than that of prohibitory injunctions.

28. The considerations for granting interlocutory mandatory injunctions were well stated in the case of *Kenya Breweries Ltd & Another v Washington O. Okeyo* [2002] eKLR where the Court of Appeal said:-

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

29. The Court of Appeal quoted with approval an English decision in the case of *Locabail International Finance Ltd v Agroexport & Others* (1986) 1 ALLER 901 where it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly be granted, that being a different and higher standard than was required for a prohibitory injunction.”

30. In the more recent case of *Nation Media Group & 2 others vs John Harun Mwau* [2014] eKLR the Court of Appeal said:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

31. The jurisprudence arising from the above decisions is that a court considering an application for interlocutory mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. In this case, the plaintiff claims that the defendant has deliberately and/maliciously debited its accounts with illegal and/or unlawful entries/charges. It further alleges that the Defendant unilaterally and secretly opened accounts in its name and debited the same with unexplained and/or unwarranted charges and that despite its numerous complaints over the issue of unlawful debits, the Defendant has not made good its case. The defendant, on the other hand accuses the plaintiff of using the court process to avoid fulfilling its financial obligations.

32. In view of the accusations and counter-accusations by the parties, I find that this is not a clear or exceptional case for which an order of mandatory injunction can be issued. It is clear to me that the issues raised by the parties will require unpacking during the hearing of the main case before they can be determined on merits.

33. I also find that the plaintiff has not demonstrated that it has put any measures in place to repay the debt or complied fully with the terms of the restructure letter. In effect, the plaintiff can be said to be seeking equitable reliefs when it does not have clean hands in as far as compliance with the restructure letter is concerned. In *Mrao Limited v First American Bank* (supra) it was held as follows;

“The applicant had come to a court of equity but having failed to show utmost good faith I cannot but hold that it was not entitled to the injunction it prayed for in its application.”

34. I am therefore not satisfied that the plaintiff has established a prima facie case against the defendant so as to warrant the granting of the orders of injunction.

35. Having ruled on the aspect of prima facie case, I find that it would not be necessary to consider the 2 remaining conditions for granting injunction. However, even if the second principle was to be taken into consideration, I find the Applicants have not demonstrated that they will suffer an injury which cannot be adequately compensated by an award of damages as the subject matter of this suit is the amount of money owing to the defendant.

36. Given the background of this case and the conduct of the plaintiff, I find that the balance of convenience would tilt in favour of the defendant who is owed a substantial amount of money which it is entitled to recover under the terms of their agreement. The upshot is that I find that the application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 11th day of December 2019.

W. A. OKWANY

JUDGE

In the presence of:

Mr Muchoki for the plaintiff/applicant

Mr. Chege for defendant/respondent

Court Assistant – Sylvia