



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 107 OF 2018

RUKUNDO LIMITED.....PLAINTIFF/APPLICANT

-VERSUS -

JAMII BORA BANK LIMITED.....1ST DEFENDANT/RESPONDENT

ANTIQUA AUCTIONS AGENCIES.....2ND DEFENDANT/RESPONDENT

ROBERT WAWERU MAINA.....3RD DEFENDANT/RESPONDENT

R U L I N G

1. The applicant, **RUKUNDO LIMITED**, has asked the Court to order the 1st respondent, **JAMII BORA BANK LIMITED**, to render proper accounts in respect to the loan which the bank had given to the applicant.
2. The applicant also sought orders to compel the bank to furnish it with comprehensive documentation in respect to the Mortgage Protection Insurance and House Owner Comprehensive Insurance.
3. Thirdly, the applicant asked the court to grant an Injunction to restrain the defendants from selling, transferring, alienating or advertising the suit property, L.R. No. 3734/231 (Original Number 3734/5/118), LAVINGTON, NAIROBI.
4. In the alternative to the prayer for an interlocutory injunction, the applicant asked the court to extend by 24 months, the period for rectifying any default to redeem the suit property.
5. In the further alternative to either the interlocutory injunction or the extension of time to rectify the default to redeem the suit property, the applicant asked the court to Suspend or Postpone the bank's Statutory Powers of Sale, by 24 months.
6. When canvassing the application, Mr. Mwalo, the learned advocate for the applicant, stated that his client had never been served with any statutory notices. He said that it was only on 22nd January 2018 that the plaintiff became aware of the bank's intention to sell the suit property.
7. The sale was scheduled for 21st March 2018.
8. Assuming that the plaintiff first became aware about the intended sale on 22nd January 2018, I find that the plaintiff was guilty of an unexplained delay in coming to court, as it was not until 15th March 2018 when the suit was filed.
9. On the issue of statutory notices, the bank has provided copies of what was served upon the plaintiff and the plaintiff's directors. On a prima facie basis, I find that the bank did serve all the requisite notices upon the plaintiff.
10. The plaintiff drew the court's attention to the fact that "the facility given by the bank was insured."
11. Therefore, it was the plaintiff's case that following the demise of one of the company's two directors, the insurer ought to have paid compensation to the bank.

12. If the insurer had made payment to the bank, it is the plaintiff's view that such payment would have either cleared the balance or it could have significantly reduced the outstanding balance.
13. The plaintiff told the court that it did give to the bank, the duly filled forms which were to be utilized in seeking compensation from the Insurance Company.
14. Notwithstanding the bank's promise to follow-up on the issue of compensation, the plaintiff said that the bank had never informed it whether or not the application for compensation was rejected by the insurer.
15. Therefore, the plaintiff blamed the bank for treating the issue concerning the insurance policy with a lot of secrecy.
16. The bank's answer was that the loan could not be insured as the chargor was not a natural person.
17. To my mind, the mere fact that the chargor was a body corporate could not preclude the loan from being insured.
18. However, if it is presumed that the loan could not be insured, yet premiums were being remitted, the question which arises is whether or not the said premiums should be credited to the plaintiff's account.
19. Meanwhile, as the plaintiff said, the bank is not the entity which had provided the insurance policy. Therefore, I agree with the plaintiff that the only "person" who could conclusively state whether or not the loan was insured, is the **MADISON INSURANCE COMPANY KENYA LIMITED**.
20. However, on a prima facie basis, a reading of the **GROUP MORTGAGE PROTECTION POLICY** which was issued by Madison, suggests that the policy was only available to natural persons. I so find because the policy makes reference to matters such as "Death," "Permanent and Total Disability", "Retrenchment", and the need to undergo medical examination.
21. In the circumstances, I do not understand what the bank meant when it stated that the plaintiff had defaulted in the payments of premiums of the Mortgage Protection Insurance (*Life Assurance Cover*), from way bank in November, 2016.
22. If the plaintiff could not have been insured because it was not a natural person, it would not be possible for it to default in the payment of premiums because no premiums would have been payable at all.
23. Such money as may have been received from the plaintiff, under the guise of the premiums for the insurance policy which the bank says could not hold, ought to be accounted for.
24. The plaintiff pointed out that there was a tenant who was residing in the suit property. The said tenant was said to be paying Kshs. 450,000/= as a rent, every month.
25. In the light of the fact that the loan was payable through monthly instalments of Kshs 399,000/= each, I fail to understand why the plaintiff fell into arrears.
26. To my mind, the plaintiff's obligation was simply to remit the monthly instalments. If it discharged that obligation, yet the bank was still intent on realizing the security, the court would most probably grant an interlocutory injunction to restrain the bank.
27. The point I am making is that the assertion by a borrower, that the lender had not provided him with Statements of Account, either regularly or at all, is not a sufficient basis for granting an injunction.
28. Evidence that shows that the borrower was paying money to his loan account, in accordance with the terms of the loan agreement is available to the borrower. Therefore, the borrower ought to be able to demonstrate to the court that he was not in arrears as alleged or at all.
29. Once the borrower provides evidence of his payments, the evidential burden shifts to the lender, to show that regardless of the payments made, the borrower was still in arrears, or that the borrower was still in breach of some other contractual obligation.
30. In this case, the borrower did not make available evidence of the payments it had been making.
31. However, the lender provided a statement of account, dating back to the 5th of October 2012, when the loan was disbursed. It appears that the repayments were fairly regular until April 2016. Thereafter, the plaintiff appears to have run into a difficult patch, which resulted in somewhat irregular remittances.
32. The point I am making is that the demise of Dr. Jotham Musiime, who was one of the plaintiff's directors, does not appear to have been the cause of the irregular remittances. The said director passed away almost a year after the remittances had started becoming irregular.
33. But even if the arrears had started accumulating after the death of one of the plaintiff's directors that could not be the basis for the grant of an interlocutory injunction.
34. The demise of any person gives rise to sympathy and empathy, which are critical human emotions.

35. Such emotions ought to impact on how human beings respond to one another. However, the relationships between companies which were parties to a contract cannot be suspended by a court of law, based solely on the consideration of whether or not one party had treated the other party in a humane manner.

36. In this case, I have found no reason in law or in fact to warrant the grant of the interlocutory reliefs sought. Accordingly, the application dated 13th March 2018 is dismissed, with costs to the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI, this 4th day of June 2018.

FRED A. OCHIENG'

J U D G E