



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 33 OF 2018

CHARLES GATHII NGANGA.....1ST PLAINTIFF

MICROHOUSE TECHNOLOGIES LIMITED.....2ND PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 27th February 2018 and filed on 28th February 2018 was filed under the provisions of Order 40 Rule 2, 3, 4 and 5 Civil Procedure Rules 2010 and Section 1A, 1B and 3A Civil Procedure Act and all other enabling provisions of the law. Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent

3. THAT a mandatory injunction do issue compelling the Defendant to withdraw/Remove and/on suspend the listing or reporting of the 1st and 2nd Plaintiff at the Credit Reference Bureau as non performing account holders with respect to overdrafts of Kshs 6526.15 in bank account number 0240290094281 and Kshs 158,323.20 in bank account number 0150200059201 respectively pending the hearing and determination of the instant suit.

4. HAT the Defendant be restrained from listing or reporting the 1st and 2nd Plaintiffs at the Credit Reference Bureau as Non performing account holders in the sum of Kshs 154,000/= and 840,000/= pending the hearing and determination of the instant suit.

5. THAT the costs of this application be provided for.

2. The Plaintiffs' Written Submissions were dated and filed 27th June 2018 while those of the Defendant were dated 20th July 2018 and filed on 31st July 2018.

3. When the matter came before the court on 31st July 2018, the parties requested that the court deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

4. The present application was supported by the Affidavit of the 1st Plaintiff that was sworn on 28th February 2018. His Supplementary Affidavit was sworn on 12th June 2018 and filed on 13th June 2018.

5. The Plaintiffs' case was that the Defendant reported the 2nd Plaintiff to the Credit Reference Bureau (CRB) for listing as non performing account holders on alleged overdrafts of Kshs 6,526.15 and Kshs 158,323.20/=.

6. They stated that their listing by CRB was unprocedural as it did not follow the laid down requirements of the Credit Bureau Regulations, 2013. It was their contention that due to the illegal listing, the 2nd Plaintiff had been unable to secure loan facilities to enable it service several tenders and contracts it had been awarded as a result of which it had been unable to perform its contractual obligations thereby suffering losses.

7. They contended that since they settled the said aforesaid balances, their names should be removed from the listing of CRB. They averred that their continued listing at the CRB had caused and continue to cause the 2nd Plaintiff, in which the 1st Plaintiff was a Director and a shareholder, to suffer irreparable harm that could not be compensated by way of costs.

8. They therefore urged this court to allow their application as prayed.

THE DEFENDANT'S CASE

9. In response to the said application, Christopher Maingi, the Defendant's Credit Manager swore a Replying Affidavit on 30th May 2018. The same was filed on 31st (sic) May 2018.

10. The Defendant stated that the Plaintiffs had four (4) non-performing loans but the only non performing loans it reported to the CRB were in the names of the 1st Plaintiff and 2nd Plaintiff who had outstanding loan balances of Kshs 55,002.31 and Kshs 158,423/= in Account Nos 0240290094281 and 0150200059201 respectively.

11. It pointed out that it was mandated by Regulation 18 (1) and 18 (2) of the Credit Reference Bureau Regulations to share with CRB any information concerning a customer's non-performing loan or any positive or negative information concerning a customer.

12. It averred that despite the 1st and 2nd Plaintiffs having deposited a sum of Kshs 55,050/= and Kshs 158,423.40/= into their aforesaid bank accounts, they were still indebted to it for a total of Kshs 705,399.58/=.

13. It pointed out that under Regulation 33 (1) (a) of the Credit Reference Bureau Regulations, Credit Reference Bureau (CRB's) were mandated to retain customer information on non-performing loans until the expiry of five (5) years from the date of final settlement of the amounts in default.

14. It was therefore its contention that as the Plaintiffs' present application was based on falsehoods, misrepresentation and concealment of facts and as they had unclean hands as they knew they were indebted to it, the said application should be dismissed with costs to it as no *prima facie* case had been demonstrated.

LEGAL ANALYSIS

15. The Plaintiffs submitted that they were never served with the requisite Notice of Default before they were listed with the CRB, that they were not issued with an Adverse Action Notice, that they were not served with a Notice in the prescribed form of the Defendant's intention to submit negative information and that they were not served with the thirty (30) days Notice notifying them that they had been listed with the CRB. It was on that basis that they contended that they had established a *prima facie* case warranting them to be granted a mandatory injunction.

16. In addition, they stated that the CRB had no business continuing to list them because they had fully repaid the loans that had been non-performing. They averred that it was wrong for them to continue being listed for loans that had not been reported to the CRB.

17. It was their further averment that they continued to suffer loss that could not be compensated by way of damages and thus asked this court to grant them a mandatory injunction.

18. In this regard, they relied on the cases of **Kenya Breweries Ltd vs Washington Okeyo [2020] (sic) EA 109** and **Locabail International France Ltd vs Agroexport & Others [1986] 1 ALL ER 901** where the common thread was that a mandatory injunction can be granted on interlocutory application if there are special circumstances and where the court feels that it is a clear case which can be decided at once.

19. On its part, the Defendant relied on the case of **Kenya Breweries Ltd vs Washington Okeyo [2002] EA 109** that was also relied upon by the Plaintiffs and **Maher Unissa Karim vs Edward Oluoch Odumbe [2015]** where the holdings were similar to those in the cases the Plaintiffs relied upon to the effect that a mandatory injunction is only granted in the clearest of the cases.

20. It argued that this was not a clear and simple matter that was deserving of a mandatory injunction but rather that the matter required to be interrogated during trial.

21. It submitted that the Plaintiffs had not demonstrated that they had a *prima facie* case or that they would suffer irreparable harm that could not be compensated by way of damages if the injunction was not granted or that the injunction ought to be granted on a balance of convenience.

22. To buttress its argument, it placed reliance on the cases of **Olympics Sports House Ltd vs School Equipment Centre Ltd [2012] eKLR** and **Mrao vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR** wherein a *prima facie* case was defined.

23. The Plaintiffs had exhibited, in their Supporting Affidavit, many tenders showing that they were unable to service due to lack of financial

accommodation from financial institutions. This court found that if it were to find at the end of the trial that the Plaintiffs had illegally been listed with CRB, it would be safe to assume that the losses they would have incurred and continue to incur could not be compensated by way of damages for the reason that they would not get any more tenders even after they were de-listed from CRB.

24. Notably, the Defendant did not provide any documentary proof of to show that they issued the Plaintiffs with the requisite Notices under the Credit Reference Bureau Regulations. For the foregoing reasons, the balance of convenience tilted in favour of the Plaintiffs being granted an injunction.

25. Having said so, this court agreed with the Defendant that this was not a clear cut case for the granting of a mandatory injunction at this interlocutory stage. Granting such an injunction could effectively determine the suit yet this court was not certain of the outcome until parties tendered their evidence during trial. The question of the continued listing of the Plaintiffs due to the non-performing loans of Kshs 154,000/= and Kshs 840,000/= would need to be interrogated.

26. The court therefore accepted the case law that was relied upon by the Defendant herein and in particular the case of **Locabail International Finance Limited vs Agro-Export & Another** (Supra) wherein the court stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of 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 easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

27. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the parties, this court came to the firm conclusion that the Plaintiffs were able to persuade this court that they had satisfied one of the conditions for the granting of an interlocutory injunction as was set out in the case of **Giella vs Cassman Brown & Co [1973] EA 358** but failed to demonstrate that they were entitled to a mandatory injunction as they had sought as there were no special circumstances warranting granting of the same.

DISPOSITION

28. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 27th February 2018 and filed on 28th February 2018 is hereby allowed in terms of Prayer No (4) therein. Costs shall be in the cause.

29. Orders accordingly.

DATED and DELIVERED at NAIROBI this 15th day of November 2018

J. KAMAU

JUDGE