REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION & ADMIRALTY DIVISION

HCC 195 OF 2018

DAVLEE ENTERPRISES LIMITED.....1ST PLAINTIFF

DAVID KIMUNYU GITAU.....2ND PLAITNIFF

Versus

BANK OF AFRICA LIMITED.....1ST DEFENDANT

BRAYAN MWANGI T/A VINTAGE AUCTIONEERS..2ND DEFENDANT

RULING

1. Tussles between Banks and their Customers are a never ending phenomena in Kenya. In this matter Davlee Enterprises Limited **(Davelee or the Principal Debtor)** joins hands with David Kimunyu Gitau **(Gitau or The Guarantor)** in seeking a Declaration against Bank of Africa Limited **(BOA)** that the intended Sale of certain properties charged in favour of BOA is unlawful. In the meantime, the two Defendants have sought a Temporary Injunction to stop the Sale of those properties through a Notice of Motion of 11th October 2018. That is what is before Court for determination.

2. Many of the facts surrounding this dispute are common and uncontested. At the request of Davlee, BOA granted the following facilities to it:-

(a) Kshs.8,200,000/= (facility letter of 7th December 2010)

(b) Kshs. 83,068,868.19 (facility letter of 3rd February 2012)

(c) USD 115,263 (facility letter of 20th March 2012)

(d) Kshs. 9,500,000/= (facility letter of 5th February 2013)

(e) Kshs. 19,467,806.96/= and USD 150,000 (facility letter of 31st May 2010)

3. Securities offered for those facilities were as follows:-

a) Charge dated 23rd May 2011 over all that property known and registered as Nairobi/Block 75/970.

b) Charge dated 17th July 2013 over all that property known and registered as Kajiado/Kaputiei-North/24651 & Kajiado/Kaputiei-North 24658.

c) Further Charge dated 18th July 2013 over all that property known and registered as Nairobi/Block 75/970.

d) Charge dated 29th August 2013 over all that property known and secured as Nairobi/Block 82/3648. (subsequently sold).

e) Charge dated 11th August 2016 over all that property known and secured as Nairobi/Block 82/3913.

f) By way of debenture dated 14th May 2015.

g) By way of deed of assignment of rental income dated 11th August 2016.

h) By way of deed of guarantee and indemnity dated 11th August 2016".

4. Following difficulties in servicing the facilities, they were restructured twice through letters of 11th March 2015 and 29th March 2016. The latter restructure is the focus of the matter at hand.

5. In the restructure, Davlee was granted a term loan of Khs.41,317,503/= which was to be used to amalgamate and restructure its existing debts with BOA. Yet the restructure was conditional on fulfilment by Davlee of certain terms set out in clause 7.1 of the facility letter. Some of the key covenants there were that:-

(a) Davlee would conclude the sale of one of the charged properties being Nairobi/Block 82/3648 within 6 months which was expected to realize Khs.25,000,000/= to be channeled through BOA.

(b) The proceeds were to be applied towards reduction of the existing debt.

(c) Davlee to provide an alternative title Deed with a forced sale value of at least Khs.10,000,000/= to cater for the unsecured portion after the sale.

6. The Sale did proceed but the anticipated price of Ksh.25,000,000/= was not realized. Instead, the Sale price achieved was Kshs.15,000,000/=. Of this amount, Khs.14,000,000/= was paid to the Bank and Khs.1,000,000/= was expended by and on behalf of Gitau.

7. BOA alleges that even after the restructuring, Davlee continued to breach the terms of the agreement and failed to make payments as and when they became due. Following what it saw as persistent default, BOA issued a 40 day Statutory Notice under the provisions of Section 96(2) of The Land Act (Act No. 6 of 2012) upon Gitau as Chargor for the Sale of the charged properties. The letter was copied to Davlee as Principal Debtor. Receipt of the Notices is not denied.

8. The Plaintiffs resist the intended Sale arguing, in the main, that Davlee is not in default. The argument is anchored on the provisions of clause 8.1. of the facility letter which reads:-

8.1 The Facility shall be repayable in 84 (Eighty Four) monthly installments comprising principal and interest as per the loan repayment schedule that shall be submitted to the Borrower once the restructure of the Facility takes effect.

The Facility repayment shall be reduced to 60 (sixty) monthly instalments, on completion of the sale of the property Title Number Nairobi/Block 82/3648, comprising principal and interest, as per the loan repayment schedule that shall be submitted to the Borrower once the restructure of the Facility takes effect.

If restructure is effected on or before the 15th day of the month, the first instalment shall be taken on or before the last day of the same month by standing order from the Borrower's current account. If restructure is effected after the 15th day of the month, the first instalment shall be taken on or before the last day of the following month by standing order from the Borrower's current account. In the event that the due date of payment falls on a non-banking day, the repayment shall be due on the following day".

9. It is submitted for the Plaintiff that although Davlee fulfilled its part of the bargain under the terms of the restructure, the Bank has not submitted the loan repayment schedule and without that information Davlee would not know its monthly obligation.

10. The Bank on the other hand asserts that the loan repayment schedule was always available at the Bank but that Borrower had not requested for it. That in any event, Davlee would be fully aware of the repayment amount and that as the repayment was to be done by way of debit from the Davlee's account then Davlee would not be justified in failing to put funds into the account.

11. The Bank also explained what a loan repayment schedule is. Mr. Samuel Irungu a Recoveries Officer with the Bank swore an affidavit on 24th October 2018 in which he depones that a loan repayment schedule sets out the following:-

(a) The amount advanced.

(b) The monthly repayments expected.

(c) The application of the installments towards the principal and interest payments.

This is on the assumption that the Borrower complied from month to month and is not in default. He however posits that once there is breach then the schedule cannot apply as the account would have fallen into arrears and would thereby attract default penalties.

12. What am I to make of these rival positions? And as I make my observations, the Court is keenly aware that this is an Interlocutory session and it should not be drawn into making final findings on matters which will be decided by the Trial Court.

13. The controversy presented revolves around the interpretation of the first two parts of clause 8.1 which are produced:-

> **"The Facility shall be repayable in 84 (Eighty Four) monthly installments comprising principal and interest as per the loan repayment schedule that shall be submitted to the Borrower once the restructure of the Facility takes effect.**
>
> **The Facility repayment shall be reduced to 60 (sixty) monthly instalments, on completion of the sale of the property Title Number Nairobi/Block 82/3648, comprising principal and interest, as per the loan repayment schedule that shall be submitted to the Borrower once the restructure of the Facility takes effect".**

14. On a plain reading, the terms of the clause seem to place the responsibility of submitting the loan repayment schedule on the Bank. The words used are that "*the loan repayment schedule shall be submitted to the Borrower once the restructure of the facility takes effect"*. Clearly, it is the Bank to provide the schedule to the Borrower. It would appear that the restructure took effect upon the Sale of Nairobi/Block 82/3648, the application of the Purchase price towards reduction of the loan and the Borrower providing an alternative security.

15. Now, it is common ground that BOA has not submitted the loan repayment schedule. But it is also common ground that neither the principal Borrower nor the Guarantor have made any repayments. Can there be said to be default in these circumstances?

16. In answering this question one must understand the purpose of the Loan Repayment Schedule. Thankfully, there is no difficulty as an explanation has been offered by the Bank which the Plaintiffs were happy to accept. One object of the schedule is to inform the Borrower of the monthly instalments he is expected to make towards repayment of the loan. This explanation is in comport with the express provisions of clause 8.1 which obliges the Borrower to make repayments in 60 months instalments on completion of the Sale of Nairobi/Block 82/3648 as per the loan repayment schedule.

17. Technically, at least, one may not be accused of default in payment of monthly instalments when he was not informed of what monthly payment to make. But the Bank counters this argument by asserting that the Borrower was fully aware of his monthly obligation as the rate of repayment remained the same notwithstanding the restructure. However, the Bank was not able to point to any document that connected the monthly obligation under the restructured arrangement with that of the former arrangement or to a conduct of the Borrower which would demonstrate that he was well aware of his monthly obligation in the new arrangement.

18. That said, it can be argued for the Bank that this was merely an excuse to default because clause 7.1 (g) placed the following obligation on Davelee:-

> ***"(g) The Borrower covenants to resume consolidation and routing all banking through their account at Bank of Africa Kenya Limited".***

But this argument is weakened because the Statutory Notice issued by the Bank calls up payment of the entire debt not because this covenant was breached but because of breach in repayment of the loan.

19. The Court reaches a conclusion that the Plaintiffs have made a prima facie case that they are not in default in repayment. This is where the strength in the matter lies even though it is an argument that the Plaintiffs had not taken up before. It is plausible and cannot be wished away notwithstanding the Plaintiffs have taken advantage of a lapse on the part of the Bank to postpone their obligation to repay.

20. But there is yet another issue. It has been argued by the Bank's Counsel that the Plaintiffs are not deserving of grant of a temporary injunction because they have not sought a Permanent Injunction on the substantive claim. I understand the law to be that any Orders granted at the interlocutory stage should not be inconsistent with the main Prayers sought. The substantive Prayer requested by the Plaintiffs is a Declaration that the intended Sale of the charged properties is unlawful. There is nothing harmony if the Sales were now to be injuncted pending the Hearing and determination of that substantive Claim. In fact the grant of a Temporary Injunction preserves the subject matter of the suit which are the properties whose intended sale is challenged in the main suit. There is harmony between the orders sought at this Interlocutory stage with the Prayers pleaded in the Plaint.

21 Another issue. It is obvious that even if the Bank were not to be injuncted, then any loss suffered by the Plaintiff can be sufficiently remedied by way of damages. Any argument that the Application does not satisfy the second test in GIELLA VS. CASSMAN BROWN [1973] EA 358. While it is true that an Interlocutory Injunction will not normally issue if damages would be an adequate remedy, this is not an inflexible rule because there would be circumstances where, notwithstanding the sufficiency of the remedy of Damages, it would be against the equitable conscience of the Court not to grant an Order of Injunction. This was well explained by Ringera J in Waithaka vs. Industrial & Commercial Development Corporation [2001] KLR 374 at page 381:-

> "*As regards damages, I must say that in my understanding of the law, it is not an inexorable* ***rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.***
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> ***By using the word "normally" the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant this may move a Court of equity to say:***

> ***"money is not everything at all times and in all circumstances and don't you think you can violate another citizen's rights only at the pain of damages."***

In the matter before Court I have found that there is possibly no default at all on the Plaintiffs part given the terms of the Contract and I must wonder whether it would be equitable to allow Gitau's equity of redemption over the Charged Properties to be possibly extinguished by allowing the intended sale to proceed.

22. The upshot is that I allow the Notice of Motion dated 11th October 2018 in terms of Prayer 1. Costs to the Plaintiff. However, now that the loan repayment schedule has been provided, the Bank shall be entitled to enforce its Statutory right available under the Security documents in the event of default.

Dated, delivered and signed in open Court at Nairobi this 6th Day of December, 2018.

F. TUIYOTT

JUDGE

Present;

Ratemo h/b Sahunyi for Plaintiff

Maodo for Defendant

Nixon-Court Assistant