



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 89 OF 2016

VALLEY ROAD MOTORS LIMITED.....PLAINTIFF

-VERSUS-

GULF AFRICAN BANK LIMITED.....1ST DEFENDANT

JOSEPH M. GIKONYO T/A

GARAM INVESTMENTS.....2ND DEFENDANT

PAUL OGUNDE, ALEXANDRA KONTOS, MICHAEL KONTOS T/A

WALKER KONTOS ADVOCATES.....3RD DEFENDANT

RULING

1. The Plaintiff/Applicant, **Valley Road Motors Limited**, moved the Court under a Certificate of Urgency vide the Notice of Motion dated **23rd March, 2016** pursuant to the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act** as well as **Order 40 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules, 2010** seeking for the following orders:

1. Spent

2. Spent

3. That the Court be pleased to issue a temporary injunction restraining the Defendants herein, their servants, agents and or employees from selling, offering for sale either by auction or private treaty, disposing or alienating or in any other manner whatsoever dealing with parcel of land L.R No. Nairobi Block 112/5 or any part thereof pending the hearing and final determination of this suit.

4. That the Court be pleased to order the 1st Defendant to deliver up and or release to the Plaintiff logbooks for Motor Vehicles Toyota Hilux Double cabin bearing registration numbers KBR 548B, KBR 547, KBR 451B, KBR 458B, KBR 456B, KBR 543B, KBR 460B, KBR 536X, KBR 457B.

5. That the Court be pleased to issue a temporary injunction restraining the 2nd and 3rd Defendants from demanding Auctioneers fees and legal fees respectively from the Plaintiff as a condition to suspend the auction of the property L.R No. Nairobi Block 112/5 pending the hearing and determination of the suit.

6. That Costs be provided for.

2. The application was hinged on the several grounds set out therein, and was further supported by the annexed affidavit of **FRANCIS NGANGA MUNDIA** sworn on **23rd March, 2016** together with the annexures thereto. The Plaintiff also filed a further affidavit sworn on **13th June 2016**.

3. The background to the instant application is that the Plaintiff, who is involved in the business of buying and selling cars, applied for finance from the 1st Defendant for the purposes of purchasing various motor vehicles. Vide a Letter of Offer dated **20th August 2014**, the Plaintiff was offered a loan facility of **Kshs. 35,200,000/=** by the 1st Defendant and the said loan facility was secured by the joint registration of eight units of Toyota Prado motor vehicles and two units of Toyota Land cruiser motor vehicles in the joint names of the Plaintiff and the 1st Defendant. The Plaintiff was further offered a credit facility of **Kshs. 30,000,000/=** vide a Letter of Offer dated **9th September 2014** for the purpose of purchasing the property known as **L.R No. Nairobi Block 112/5** (hereinafter "**the suit property**"), also referred to as **Deal No. 3758** as per the Bank records. The facility was secured by the registration of a Charge on the suit property. On or about **4th December 2014**, the Plaintiff requested for an additional asset finance of **Kshs. 15,728,000/=** to acquire eight units of Toyota Hilux double cabin motor vehicles, being **Deal No. 3751**.

4. The Plaintiff avers that on **24th November 2015**, the 1st Defendant wrote to them and confirmed that the amount advanced in respect of **Deal No. 3751**, namely **Kshs. 16,367,892.60**, had been fully settled. However, on or about **27th November 2015** the Plaintiff received a demand notice from the 3rd Defendant alleging that they had refused and or failed to comply with the Statutory Notice dated **1st July 2015** and that there was an outstanding debt of **Kshs. 63,225,834.11** which required immediate settlement. The Plaintiff contended that they had never been served with the alleged statutory notice dated **1st July 2015**.

5. The Plaintiff further averred that on **14th March 2016** they paid **Kshs. 1,088,000/=** in reduction of the loan facility secured by the suit property. Thereafter, the 1st Defendant wrote to the Plaintiff vide the letter dated **17th March 2016** confirming that the said finance facility per **Deal number 3758** had no arrears as of that date. However, on **21st March 2016** the Plaintiff received a Notification of Sale from the 2nd Defendant informing them that as at **20th January 2016** they were in arrears of **Kshs. 58,675,843.77** and further stated therein that they would sell the subject property on **29th March 2016**. In the said notice the 2nd Defendant was demanding money for **Deals No. 3758, 3675 and 3998**; and that the 1st Defendant did not take into account the payment of **Kshs. 1,088,000** that was paid by the Plaintiff on **14th March 2016**, or the other payments made in respect of the various facilities.

6. Thus, the Plaintiff's case was that the Defendants had advertised the suit property for sale by public auction yet there were no arrears in respect of the loan account secured by the said suit property. The Plaintiff further contended that the amount claimed by the 1st Defendant in respect of **Deal No. 3758** did not take into account the sum of **Kshs. 1,088,000/=** that it paid on **14th March 2016**. It was also the Plaintiff's assertion that the 1st Defendant had consolidated its credit/loan accounts which were secured with different securities and which had no arrears and treated them as one account in an orchestrated scheme to sell the suit property; and that though the 1st Defendant confirmed that the Plaintiff had already paid in full the credit facility in respect of the purchase motor vehicles, the 1st Defendant persisted in its refusal to release the log books of the subject motor vehicles to the Plaintiff. The Plaintiff contended that the refusal by the 1st Defendant to release the said logbooks had occasioned them great economic loss, loss of customers, damage to reputation and uncalled for criminal and civil suits.

7. The application was opposed by the Defendants, vide the Replying Affidavit sworn by **Lawi Sato** on **2nd June 2016**. The deponent, a Legal Officer employed by the 1st Defendant Bank, averred that the Plaintiff had concealed and distorted material facts in the application and in the suit. He deposed that the true status of the matter was that as at **12th May, 2016** the Plaintiff owed the Bank **Kshs. 55,636,336.02**. He averred that the facilities were classified as **Deals Nos. 3461, 3633, 3998, 3675, 3692, 3751, 3758** and **3907** of which **Deals 3907, 3751** and **3692** had been settled in full; while **Deal No. 3633** had been restructured. It was the contention of the 1st Defendant that the alleged confirmation dated **17th March, 2016** that **Deal No. 3758** had been settled did not indicate who executed it at the Bank and that it did not accord with the statements of account; it added that at **12th May, 2016**, **Deal No. 3758** had outstanding arrears of **Kshs. 1,033,873.89**. The deponent also denied the allegations that deposits made by the Plaintiff had not been credited, contending that payments were all disclosed in the statements of account as having been duly credited.

8. With regard to the release of the logbooks, the Bank's legal officer averred that **Clause 8.8** of the Letter of Offer dated **20th August 2014** provided that the said logbooks would only be released upon a minimum deposit of **Kshs. 4.4 million** with the Bank. He further averred that the said condition had been replicated in **Clause 8.8** of subsequent Letters of Offer. It was therefore the contention of the 1st Defendant that Prayer 4 of the Plaintiff's Notice of Motion seeking the release of logbooks was untenable.

9. As regards the consolidation of the facilities, the deponent averred that the Plaintiff had mischievously concealed the Charge dated **1st December, 2014**, particularly **Clause 2.3** thereof, in which it had been expressly provided that the Plaintiff had agreed that the Bank would consolidate and combine its accounts. He also added that under **Clause 11** of the Letters of Offer pertaining to all the facilities issued to the applicant, a default in any one facility constituted a default in all the other facilities. It was also his assertion that the Plaintiff had been duly notified of its default in the Statutory Notice issued on **1st July, 2015**, of which it duly acknowledged receipt. *(A copy of the duly acknowledged notice was attached to the deponent's affidavit and marked under exhibit "LS 1")*

10. In response to the 1st Defendant's averments, the Plaintiff filed a Further Affidavit on **13th June 2016** contending that it had neither concealed nor distorted any material facts. The Plaintiff confirmed that it had cleared **Deals. Nos. 3907, 3751** and **3692**; and that the 1st Defendant had refused to give credit for the deposits made in respect of the other deals. It was the Plaintiff's contention that despite confirming that **Deal No. 3751** had been fully settled, the 1st Defendant had unjustifiably refused to release the log books of the subject motor vehicles.

11. As for the letter of offer dated **20th August 2014** which the 1st Defendant relied on in support of the assertion that the Plaintiff was to deposit **Kshs. 4.4 million** before the logbooks could be released, the Plaintiff averred that the same referred to different motor vehicles and not the ones that are the subject of the present application. The Plaintiff noted that the said Letter of Offer referred to Toyota Prado units while the Plaintiff had prayed for the release of logbooks for Toyota Hilux double cabin units. It was the Plaintiff's assertion that, as confirmed by the 1st Defendant's own letter dated **24th November, 2015**, it had fully paid the facility secured by the various units of Toyota Hilux double cabins as aforesaid, and therefore the 1st Defendant was under obligation to release the said logbooks; adding that that it was fraudulent of the 1st Defendant to rely on the Letter of Offer dated **20th August 2014**, as its basis for not releasing the logbooks, since they secured different motor vehicles from the ones being claimed in the present application.

12. The Plaintiff denied the allegations that it had concealed the charge dated **1st December 2014**. It contended that it was only aware of the Charge after its registration with the Ministry of Lands on **3rd December 2014** against the title of the suit property herein. It was further the Plaintiff's contention that nowhere in the said Charge had it been stated that the facilities and/or deals separately obtained and with different securities would be consolidated by the Bank. The Plaintiff averred that as indicated in the 1st Defendant's letter dated **17th March, 2016**, it was not in any arrears on the facility and **Deal No. 3758**

secured by the suit property. Therefore, according to the Plaintiff, the Defendants had no reasonable grounds for seeking to auction the said suit property. The Plaintiff also contended that there was no provision in any of the Letters of Offer stating that a default in any one facility constituted a default on all the other facilities.

13. The application was disposed of by way of written submissions which were highlighted on **9th November 2016**. The Plaintiff filed its written submissions on **12th July 2016** while the Defendants relied on their written submissions filed on **27th July 2016**. I have carefully considered the submissions together with the Lists of Authorities filed therewith.

14. The main issue for determination is whether the conditions set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 360** have been met by the Plaintiff herein. The conditions set out in the said case are that:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

15. As to whether the Plaintiff has made out a ***prima facie* case with probability of success**, I consider the following to be the pertinent issues:-

- **Whether the 1st Defendant had the right to consolidate the Plaintiff's credit/loan accounts;**
- **Whether Deal No. 3758 relating to the suit property has been settled in full;**
- **Whether the Plaintiff was served with the Statutory Notice before the advertisement of the suit property for sale.**

Whether the 1st Defendant had the right to consolidate the Plaintiff's credit/loan accounts

16. It was submitted for the Plaintiff that the 1st Defendant had illegally consolidated the facilities advanced to the Plaintiff contrary to the Charge documents and Letters of Offer. On the other hand, the 1st Defendant's Counsel submitted that the 1st Defendant had the right to consolidate the outstanding debts. Counsel for the Defendants placed reliance on **Clause 2.3** of the Charge and submitted that the said clause expressly provided that the Plaintiff had agreed to the 1st Defendant consolidating the accounts therein. He further submitted that **Section 83 of the Land Act** allowed for consolidation of debts.

17. **Clause 2.3** of the Charge document dated **1st December 2014** and executed on **3rd December 2014** does appear to give the 1st Defendant the right to consolidate the accounts held by the Plaintiff with a view of satisfying any outstanding debt. The said clause provides thus in part:

"2.3 The Chargor hereby agrees that the Chargee may at any time without notice notwithstanding any settlement of account or other matter whatsoever combine or consolidate all or any of its then existing accounts...and set-off or transfer any sum standing to the credit of any one or more such accounts in or towards satisfaction of any obligations and liabilities of the Chargor to the Chargee..."

18. Moreover, **Clause 7** (titled 'security') of the Letters of Offer dated **20th August 2014** and **9th September 2014**, respectively, provides thus:-

"It is a term of this facility that prior to drawdown the Customer procures that the Bank receives the under-mentioned documents...as a continuing security for all moneys obligations and liabilities certain or contingent now or hereafter due, owing or incurred by the Customer to the Bank..."

It is therefore prima facie evident from the foregoing that the 1st Defendant had a right to consolidate the securities in realizing the credit facilities offered to the Plaintiff in the event of default.

19. Accordingly, there is sufficient evidence to conclude, for the purposes of the instant application, that the 1st Defendant had the right to sell the suit property or the subject motor vehicles in the event of any default in respect of any of the credit facilities. The Plaintiff does not deny that there are outstanding balances in respect of other Deals. At paragraph 27 of the Supporting Affidavit, the Plaintiff admits that **Deal No. 3999** had an outstanding balance of **Kshs. 26,987,426.57**. In the same vein, it would be illogical for the Plaintiff to accuse the 1st Defendant of refusing to release the logbooks of certain motor vehicles when it is admittedly in default in respect of some of the Deals thereby affording the 1st Defendant the right to realize any of the securities in recovery of the outstanding debt.

20. As for the Plaintiff's allegation that the 1st Defendant has failed to account for the several deposits it has made, this is an issue of accounts which cannot bar the 1st Defendant from exercising its statutory power of sale.

Whether deal no. 3758 relating to the suit property has been settled in full

21. This Court having found that there was an admission of an outstanding debt owing from the Plaintiff to the Defendant, it is inconsequential that **Deal No. 3758** or any other deal had been settled in full. The 1st Defendant was at liberty to use the securities therein in realizing any outstanding debt. The foregoing notwithstanding there appears to be a disputation on whether or not **Deal No. 3758** had been settled in full. The Plaintiff relied on a letter dated **17th March 2016**, in which the 1st Defendant confirmed that the finance facility for the suit property, **Deal No. 3758** had no arrears as at that date. The contents of this letter, as the Court understands it, mean that the Plaintiff had paid the amounts payable when they fell due. It does not necessarily mean that the account had been settled in full. In fact, the statement of accounts provided by the Plaintiff and attached to the supporting affidavit seems to show that **Deal No. 3758** had not been settled in full. (*see exhibit FNM 13*) The Summarized Statement of accounts therein which is from **01/03/2009** to **15/03/2016** shows that there was an outstanding amount of **Kshs. 23,843,008.51**.

Whether the Plaintiff was served with the Statutory Notice before the advertisement of the suit property for sale

22. The Plaintiff contended that it had never been served with the requisite three months' notice to repay the facility. It was their argument that failure by the Plaintiff to serve them with the said statutory notice amounted to an illegality as the same was part of their right to equity of redemption. On the other hand, the 1st Defendant posited that the Plaintiff was duly issued with the Statutory Notice and that they acknowledged receipt by stamping the same. The 1st Defendant attached a copy of the said Statutory Notice with the Plaintiff's stamp affixed on it acknowledging receipt on the **2nd of July 2015**. This is *prima facie* evidence that the Plaintiff was indeed duly served with the said notice. The Plaintiff has not challenged the authenticity of the said stamp or alleged forgery. In the premises, it is not enough for the Plaintiff to merely allege that they were never served with the requisite Statutory Notice.

23. As to whether the 2nd and 3rd Defendants are entitled to fees as a condition for suspending the auction, the Plaintiff's argument was that the 3rd Defendant is a firm of Advocates, and that their fees from their instructing client, and therefore there was no basis for such fees to be claimed from the Plaintiff. In similar vein, the Plaintiff received a fee note for **Kshs. 461,360.16** dated **19th March 2016** issued by the 2nd Defendant as a condition for calling off the auction that was scheduled for **29th March 2016**. It contended that the 2nd Defendant had no option but to look to the Bank for payment.

24. The response by the Defendants was that the suit and the application is misconceived to the extent that it is directed at the 2nd and 3rd Defendants for the reasons that they, at all times material to the suit, acted

as agents of a disclosed principal. It was further the Defence contention that the Plaintiff negotiated and agreed to pay the Auctioneer's costs as a condition for suspending the auction. It appears the same has since been paid, and therefore not much turns on this point. For the 3rd Defendant, it was conceded that the fees ought to be paid by the 1st Defendant and the fee note had been accordingly redirected.

25. In view of the foregoing, it is evident that the Plaintiff is not deserving of the injunction orders sought as it has failed to establish a *prima facie* case with a probability of success in respect of the three pertinent issues flagged up hearing. This being my finding, I find it unnecessary to consider whether the Plaintiff will suffer irreparable injury that cannot be compensated by way of damages or where the balance of convenience would lie. This is because the 3 conditions set out in **the Giella Case** are sequential and to be applied as separate distinct and logical hurdles, a point well explained in the Case of **Nguruman Limited Vs Jan Bonde Nielsen & Others [2014] eKLR** thus:

“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...if prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”

26. For the foregoing reasons, the order that commends itself to this Court is an order for the dismissal of the Plaintiff's Notice of Motion dated and filed on **23 March, 2016** with costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY 2017

OLGA SEWE

JUDGE