



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO.587 OF 2015**

**CHEQUEPRINT SYSTEMS LIMITED.....PLAINTIFF**

**-VERSUS-**

**KENYA COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

[1] The application before the Court is the Plaintiff's Notice of Motion dated **24<sup>th</sup> November, 2015** and filed on even date. The application is expressed to have been filed pursuant to **Sections 3A and 63 (c) & (e) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya** as read with **Order 40 Rules 1 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, 2010**, and the orders sought are:

1) Spent

2) Spent

3) That there be issued a temporary injunction restraining the Defendant whether by itself, agents, employees, servants and/or auctioneers from proceeding with the attachment and sale of the Plaintiff's chattels pending hearing and determination of the instant suit.

4) THAT cost of this application be provided for.

[2] The application is based on the grounds set out therein and supported by the Affidavit and Further affidavit of the Plaintiff's Director, **Anoop Kumar Vidyarthi**, sworn on the **24<sup>th</sup> November, 2015** and **15<sup>th</sup> September, 2016** respectively. The brief background to the application is that sometime on or about the **16<sup>th</sup> September 2013**, the Plaintiff and the Defendant entered into an agreement whereby the Defendant provided the Plaintiff with an overdraft facility in the sum of **Kshs. 14,000,000** and a term loan in the sum of **Kshs. 45,000,000**; both facilities adding up to **Kshs. 59,000,000**.

[3] The Plaintiff's Director further deposed that they had been servicing the said financial facilities by prompt payments of instalments as stipulated under the agreement between the parties; but that in the year 2015, the Company experienced turbulent times, particularly due to bank interest rate and foreign exchange rate fluctuations, thus leading to some late payments of the scheduled instalments.

Nevertheless, it was the Plaintiff's contention that their account with the Defendant had remained active and they duly paid the default interest as stipulated in the agreement, whenever late payments had been made.

[4] The Plaintiff averred further that in view of the default and late payments, the Defendant initiated recovery proceedings by taking out statutory notices of sale for all the charged properties that were used to secure the financial facilities herein. The notices were issued on **18<sup>th</sup> May, 2015** and **2<sup>nd</sup> September 2015**, respectively. The Plaintiff further averred that ever since the aforesaid notices were issued, there had not been any serious effort by the defendant to sell the said charged properties partly because it had made significant efforts to regularize its accounts with the Defendant. In this instance however, the Defendant went ahead and proclaimed their chattels, and had threatened to proceed with the sale of the chattels proclaimed in order to recover a debt of about **Kshs. 3,000,000/-** in spite of the fact that it holds securities in the form of charges on real properties valued at **Kshs. 48,000,000/-** in the open market.

[5] It was the Plaintiff's assertion that they were informed in confidence by an employee of the Defendant that the decision to sell their chattels was made at the behest of a business rival who was keen on taking advantage of the its liquidity challenges to ground its business, thus eliminating competition. It was therefore the Plaintiff's posturing that the intended sale of the chattels was actuated by malice, adding that in as much as it was in arrears of **Kshs. 3,000,000**, it had made alternative arrangements to promptly pay the said amount.

[6] The Plaintiff further averred that it had recently entered into new contracts with reputable companies whose value was in excess of **Kshs. 100,000,000**, which is in excess of what it owes the Defendant. It was thus the Plaintiff's contention that if the Defendant proceeded to sell its chattels as anticipated, the Plaintiff would lose not only the capacity to discharge its obligations under the new contracts, but also the ability to service its debts to the Defendant. It was also the Plaintiff's case that it would be inequitable, unfair and unconscionable for the Defendant to initiate a process that would have the effect of driving it out of business when the Defendant still holds securities in its favour that are capable of settling the arrears.

[7] In its Further Affidavit filed on **20 September 2016**, **Anoop Kumar Kumar Vidyarthi** deponed that during the pendency of this suit, the Plaintiff had been able to make further payments in the sum of **Kshs. 3,767,301**, and yet, in defiance of the Court orders that the parties should maintain status quo, the Defendant proceeded to advertise for the sale of the properties that are the subject matter of the suit without rendering an account or providing to the Plaintiff any report of the sale.

[8] The Defendant's response to the application was by way of the Replying Affidavit sworn on **7 December 2015** by **Tom Okoth Ogola**, the Legal Manager of the Defendant's Moi Avenue Branch. He affirmed that the Defendant had advanced the Plaintiff financial facilities amounting to **Kshs. 59,000,000**, including an Asset Based Facility (ABF) for the procurement of office equipment, which assets were registered in the joint names of the Plaintiff and the Defendant Bank. It was further averred that the Plaintiff executed the various security documents as enumerated in **Schedule 1 (B)** of the Letter of Offer dated **16 September 2013** namely, a Charge, Debenture and Personal Guarantees and Indemnity by the Plaintiff's Directors as security for the loans.

[9] It was thus the contention of the Defendant that it had the right to realize any and/or all of the assets under the different security documents in case of default by the Plaintiff in repaying the loan facilities, and reasoned that it was a term of the loan agreements that the security documents were and are independent of each other; and that the Defendant would be at liberty to recover the securities in no particular order in case of default by the Plaintiff.

[10] The Defendant denied the Plaintiff's assertion that it had been servicing the financial facilities regularly as provided for under the agreement. It averred that the Plaintiff's account went into arrears in **November, 2014** and not mid **2015** as alleged by the Plaintiff. According to the Defendant, the Plaintiff's various accounts are in arrears of **Kshs. 43,980,648.45** and not just **Kshs. 3,000,000** as claimed by the Plaintiff. The Defendant averred that the said amount of **Kshs. 3,000,000** was what the Plaintiff had

proposed to pay to forestall the recovery proceedings.

[11] With regard to the notices, the Defendant deponed that it issued a ninety day (90) Statutory Notice to the Plaintiff on **18 May, 2015** and a further forty (40) day Notice to Sell on **2 September 2015** upon the lapse of the 90 days' Notice. The Defendant averred further that it was still in the process of realizing the securities in order to recover the outstanding amounts; and that nothing in the terms of their agreements precluded it from issuing proclamation notices as it did, pursuant to the Asset Based Facility Agreement and the Debenture dated **13 December, 2013**. The Defendant further deponed that although the Plaintiff had made several proposals to the Defendant, they were yet to make good their promises to pay the outstanding amounts.

[12] Regarding the allegations by the Plaintiff that the decision to sell their chattels was influenced by a business rival, the Defendant averred that it was a stranger to the same. According to the Defendant, the said allegations were malicious and amounted to an attempt by the Plaintiff to divert attention from the fact that they are in arrears. In view of the foregoing, it was the Defendant's case that the Plaintiff was not deserving of the orders sought, more so because it had not only rushed to Court for an equitable relief with unclean hands, but also because the Plaintiff failed to do equity by demonstrating good faith.

[13] I have carefully considered the grounds upon which the Notice of Motion is based, the averments by the Plaintiff in their Supporting and Further Affidavits, the response thereto by way of the Defendant's Replying affidavit, including all the documents annexed thereto, as well as the written submissions filed herein by Learned Counsel. The tried and tested standards for the determination of an injunction application is whether the principles laid down in the case of **Giella vs. Cassman Brown & Company Ltd [1973] EA 358** have been satisfied by the Plaintiff, namely:

1. **A *prima facie* case with probability of success**
2. **Irreparable damage which cannot be compensated by an award of damages; and**
3. **The balance of convenience.**

[14] As to whether the Plaintiff has made out a prima facie case, the touchstone is case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123** in which the Court of Appeal defined a *prima facie* case as follows:

**"A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

[15] It is not in dispute that on or about the **16 September 2013**, the parties hereto entered into an agreement for the grant of certain facilities. Pursuant thereto, the Defendant offered the Plaintiff an Overdraft Facility in the sum of **Kshs. 14,000,000** and an Asset Based Facility of **Kshs. 45,000,000**; both adding up to a total sum of **Kshs. 59,000,000**. Also indubitable is the fact that the Plaintiff executed the various security documents as enumerated in **Schedule 1(B)** of the Letter of Offer dated **16 September 2013**, exhibited herein as **Annexure AKV1** to the Supporting Affidavit, namely:

- [a] **Board Resolution authorizing the borrowing of Kshs. 59,000,000 and creation of securities;**
- [b] **Directors' Personal Guarantees and Indemnities for Kshs. 59,000,000 each;**
- [c] **Debenture for Kshs. 59,000,000 over all the assets of the Borrower;**
- [d] **Legal Charge for Kshs. 5,200,000 over Kwale/Diani Beach Block/1771 in the name of Anup Kumar Vidyarthi;**

**[e] Legal Charge for Kshs. 4,550,000 over Kwale/Diani Beach Block/1772 in the name of Anup Kumar Vidyarthi;**

**[f] Legal Charge for Kshs. 4,550,000 over Kwale/Diani Beach Block/1773 in the name of Anup Kumar Vidyarthi;**

**[g] Personal Guarantee and Indemnity for Kshs. 14,300,000 executed by Kul Bushan;**

**[h] Personal Guarantee and Indemnity for Kshs. 14,300,000 executed by Anup Kumar Vidyarthi in support of the Charges.**

**[16]** The parties are in no contestation that the facilities were accessed by the Plaintiff, and that repayments have been ongoing from the date of drawdown up to the year **2015** when the Plaintiff ran into turbulent times, which it blames on interest rate and foreign exchange rate fluctuations. Accordingly it failed to pay the instalments as scheduled. It is on account of the said defaults that the Defendant initiated recovery proceedings by proclaiming the chattels that it jointly owned with the Plaintiff under the Asset Based Facility, on the basis that the said chattels were also charged to a Debenture held by the Defendant on account of the financial facilities granted to the Plaintiff.

**[16]** A look at the Letter of Offer shows that the composite facility was repayable on demand and that the Defendant had the right to realize any or all of the assets under the different security documents in case of default by the Plaintiff. (See clauses 4 and 8 of the letter of offer dated 16<sup>th</sup> September 2013 as well as clauses 5 & 9 under terms & conditions.) Accordingly, the Defendant was in order in issuing and serving the notices dated **18 May 2015, 2 September 2015, and 29 October 2015**. **[17]** Of particular relevance to the instant application is the Proclamation issued by **Baseline Auctioneers** on behalf of the Defendant dated **3 September 2015** and marked **Annexure AKV3** to the Supporting Affidavit. That Proclamation was issued pursuant to the Debenture dated **16 December 2013**, which clearly covered the total principal amount of **Kshs. 59,000,000**, by which the parties covenanted as follows as per **Clause 26** thereof:

**"...No single or partial exercise of a right or remedy provided by this deed or by law prevents the further exercise of a right or remedy or the exercise of another right or remedy. The rights and remedies provided by this deed are cumulative and not exclusive of any rights or remedies provided by law."**

**[18]** It was further agreed by the parties that the Debenture and the other securities would only be discharged upon full payment. To this end Clause 39 reads:

**"Upon the final balance of the principal monies and liabilities hereby secured having been paid off and satisfied by the Company itself to the Bank together with all interest due thereon and upon payment by the Company to the Bank of all costs, charges and expenses incurred by the Bank in relation to this deed or any action taken hereunder the Bank shall if requested by the Company and at the cost of the Company execute a discharge of this deed and all other securities granted to the Bank under the provisions in that behalf hereinbefore contained."**

**[19]** There being no dispute that the Plaintiff had fallen into arrears, there would be no justifiable cause in the circumstances for restraining the Defendant from realizing the securities provided at its disposal by the Plaintiff in the form of the Debenture, the Charges or the Personal Guarantees aforementioned. The Plaintiff however contends that what was outstanding was only **Kshs. 3,000,000** and that during the pendency of this application, it made payments to the Defendant in the sum of **Kshs. 3,767,301**. In proof of this assertion, the Plaintiff attached to its Further Affidavit a bank statement together with two letters in terms dated **15 March 2016** and **17 March 2016**, respectively.

**[20]** It is noteworthy though that even after the two payments of **8 April 2016** and **21 April 2016**, there was still a debit balance of **Kshs. 15,461,282.09** in respect of **Account No. 1142958728**. At paragraph 5

of the Defendant's Replying Affidavit, the relevant particulars of the Plaintiff's various accounts were set out, which details were further augmented by the notices marked **AKV2**. There is no doubt that the payments aforementioned were in respect of just one of the facilities; and that there were 9 other facilities in respect of which the Plaintiff was in default. Thus, according to the Defendant, the total amount that was due from the Plaintiff as at **30 November 2015** was **Kshs. 43,980,648.45**, the greater portion of which is still outstanding.

[21] Further to the foregoing, it is now settled that a dispute as to accounts cannot be a ground for clogging the Defendant's accrued statutory power of sale. For instance, in **Halsbury's Laws of England, Vol. 32 (4<sup>th</sup> Edition)**, at paragraph 725, a passage that was quoted with approval in **the Mrao Case** (supra), it is stated thus:

**"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 a 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 to him, unless, on the terms of the mortgagee, the claim is excessive."**

[18] Accordingly, it is of no help to the Plaintiff to aver that it had made alternative arrangements towards liquidation of the arrears without demonstrating what those arrangements are; nor is it helpful to its course for the Plaintiff to contend that the Defendant was motivated by malice in attaching the chattels without tangible proof of such malice. Accordingly, the Plaintiff has failed to show that there exists a right which has been infringed by the Defendant to call for a rebuttal from the latter. This Court therefore finds that the Plaintiff has failed to establish a *prima facie* case with a probability of success.

[21] I now turn to the issue as to whether the Plaintiff has demonstrated herein that it stands to suffer irreparable harm which cannot be compensated by an award of damages. As earlier stated the Plaintiff is in arrears and therefore the Defendant is within its rights to pursue the recovery proceedings. In addition, the Plaintiff lawfully offered the securities with the knowledge that the Defendant could at any time realize the same in the event of default. In any case, the chattels that have been proclaimed can be quantified and therefore compensable by an award in damages in the event the Court ultimately finds in the Plaintiff's favour. Thus, the observations made by the Court of Appeal in **Nduati Kariuki t/a Johester Merchants vs National Bank of Kenya Ltd [2006] 1 EA 96** would aptly describe the Plaintiff's lot thus:

**"a bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged."**

[22] Lastly, with regard to the issue of balance of convenience, the Courts in determining whether or not to grant prayers for injunction will always opt for the lower rather than the higher risk of injustice. In the case of **Suleiman -vs- Amboseli Resort Ltd (2004) 2 KLR 589, Ojwang Ag. J** (as he then was) expressed himself thus:

**"Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella v Cassman Brown, the Court has to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied: (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice."**

[23] This Court having found that the Plaintiff has not established a *prima facie* case and that the Plaintiff will not suffer injury that cannot be compensated by an award of damages, it follows that the balance of convenience would tilt in favour of the Defendant. Moreover, it is manifest that the Plaintiff owes the Defendant and the said arrears continue to accrue interest. Thus, I would share the view-point taken by **Lenaola, J** (as he then was) in **Jopa Villas LLC vs Private Investment Corporation & 2 Others [2009] eKLR** when he stated that:

**"I am clear in my mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1<sup>st</sup> Defendant to recover the monies lawfully advanced ... Our Courts must uphold the sanctity of lawful commercial transactions..."**

[24] In view of the foregoing, I find no merit in the Plaintiff's Notice of Motion dated 24<sup>th</sup> November 2015 and would dismiss the same with costs.

**It is so ordered.**

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2017**

**OLGA SEWE**

**JUDGE**