**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 107 OF 2016**

**SKYCRAPERS AFRICAWAY COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**FIRST COMMUNITY BANK LIMITED.....1ST DEFENDANT**

**AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....2ND DEFENDANT**

**RULING**

1. The 2nd plaintiff, **ENOCK OSORO KINARA,** is the registered proprietor of the suit property **L.R. No. NGONG/NGONG/10872.** He had the desire to develop a five-storey Apartment Block on the property.

2. Enock was interested in realizing the maximum economic potential of the property. However, he and the 1st plaintiff, **SKYCRAPERS AFRICAWAY COMPANY LIMITED,** did not have the finances needed to develop the property.

3. Therefore, as the plaintiffs have stated in paragraph 6 of the Plaint, the Company did approach the bank;

> **"…with the said proposal to develop apartments over the suit property and the bank agreed to finance the project as well as take-over a running facility of Kshs. 3,488,591.00 the plaintiff's director had with Kenya Commercial Bank".**

4. It is common ground that the parties entered into a contract, which would enable the plaintiffs put up their desired apartments.

5. The facility which the bank provided to the plaintiffs was secured by;

a. **A legal charge over the suit property; and**

b. **A Contractor's All Risk Insurance Cover, during the period of construction.**

6. Having been facilitated, the plaintiffs engaged a contractor to put up the apartments.

7. However, when the construction appeared to be progressing very well, the building collapsed.

8. The plaintiffs notified the defendants about the sad development.

9. The bank informed the plaintiffs that it was ready to wait for the Assessors Report from **AFRICA MERCHANT ASSURANCE COMPANY LIMITED (AMACO).** The said Insurance Company had been contracted by the plaintiffs to provide the All Risk Insurance Cover for the building.

10. However, **AMACO** later refused to issue the Assessors Report, or to indemnify the plaintiffs for destruction of the building.

11. The bank issued a Statutory Notice to the chargor, indicating that if the outstanding amounts were not repaid, the bank would realize the security.

12. It is the threat to realize the security, coupled with **AMACO's** refusal to indemnify the plaintiffs, which prompted the institution of these proceedings.

13. The other complaint made by the 1st plaintiff was that the bank had caused it to be listed as a defaulter, by the licensed Credit Reference Bureaus in Kenya.

14. As the plaintiffs deem the collapse of the building to have been an act which was beyond their control, and because the facility was to have been serviced from the proceeds obtained from the pre-sale and sales of the apartments, the plaintiffs reasoned that the contract had now been frustrated.

15. The plaintiffs intend to persuade the court to declare that they had been discharged from further performance of the contract.

16. It is their case that the continued existence of the apartments was fundamental for the performance of the contract. Therefore, after the building collapsed, the plaintiffs deemed it unconscionable and unjust for the bank to insist that the contract be performed.

17. It was in these circumstances that the plaintiffs filed an application for an interlocutory injunction to restrain the bank from realizing the security.

18. The plaintiffs also want the court to restrain the bank from listing them as defaulters, with the licensed Credit Reference Bureaus in Kenya.

19. In the alternative, the plaintiffs asked the court to withdraw or lift their listing as defaulters, with the Credit Reference Bureaus.

20. Finally, the plaintiffs sought an Interlocutory Mandatory Injunction to compel **AMACO** to release the Assessors Report on the collapse of the building on the suit property, and also to compensate the 1st plaintiff for the destruction of the building.

21. When canvassing the application, the plaintiffs urged the court to note that this is a unique case, because it was addressing the concept of Islamic Bank and of the **MUSHARAKA CONTRACT.**

22. But nonetheless, the plaintiffs acknowledge that the application should be determined, based on the 3 principles of granting injunctions, as set out in the celebrated case of **GIELLA Vs CASSMAN BROWN.**

23. In effect, even assuming that the case is as unique as the plaintiffs suggest, the principles applicable to it are not at all unique.

24. The first question to be answered is whether or not the plaintiffs have established a *prima facie* case with a probability of success.

25. The second question is whether or not the plaintiffs have demonstrated that if the interlocutory reliefs were not granted, they would suffer irreparable loss and damage.

26. Thirdly, if the court was in doubt, it would make a determination based on the convenience of the parties.

27. Those three questions are applicable to Interlocutory Injunctions which are intended to restrain the respondents from doing specified things, such as the realization of the security.

28. Meanwhile, in relation to Interlocutory Mandatory Injunctions, which are intended to compel the respondents to perform specified actions, the applicants have a more uphill task. I describe the task as more challenging because the applicant for a Mandatory Interlocutory Injunction must demonstrate the existence of Special Circumstances and a clear case.

29. The applicant would also need to show either that the issue had to be determined at once or that the order was directed at

> **"A single and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the Court had to feel a high degree 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".**
>
> [See **LOCABAIL INTERNATIIONAL FINANCE LTD Vs AGROEXPORT & OTHERS, THE SEA HAWK [1986] 1 ALL.E.R 901].**

30. In this case, if I were to grant a mandatory injunction to compel the Insurer to compensate the 1st plaintiff at this stage of the proceedings, I would have already determined the substantive claim.

31. There are questions concerning the policy of insurance. For instance, the plaintiffs do not appear to have a direct answer to the question whether or not the policy was renewed after the lapse of the first 12 months.

32. On a *prima facie* basis, the policy was in force for 12 months. About that fact, there does not appear to be any controversy.

33. However, the plaintiffs suggest that although 12 months had lapsed, the policy had not yet expired because the building that had been insured, collapsed during the 6 months *"Maintenance period"*.

34. On a *prima facie* basis I find that the plaintiffs have failed to establish that the *"Maintenance period"* had already begun running, whilst the building was still under construction.

35. A literal reading implies that maintenance commences after the construction is completed and has been handed over.

36. As matters stand currently, the apartments were still under construction. Therefore, on a *prima facie* basis, I find that the Maintenance period had not kicked in.

37. Secondly, the Policy Document specified the period of insurance as being;

> **"FROM: 20/08/2014 TO: 19/08/2015**
>
> **(Both dates inclusive)"**

38. Based upon that express statement, I find that the onus of proving that the policy was still in force on 6th September 2015, rests squarely on the plaintiffs. And at the present moment, the plaintiffs have not discharged that obligation, even on a *prima facie* basis.

39. The reasoning concerning the nature of the facility which the bank provided makes fascinating

reading.

40. Yes, the bank's website described **"MUSHARAKA"** as a joint enterprise for conducting some business in which the partners share profits realized according to an agreed upon ratio.

41. The example given is as follows;

> **"For instance a client who wishes to acquire a stock of goods for onward sale but who does not have the full amount required of the purchase price. Upon sale of the stock, the bank and the client will distribute the profits realized in accordance to the ratios earlier agreed upon".**

42. Therefore, the plaintiff submitted that the bank had agreed to recover its contribution only after the apartments were sold, and not before.

43. In my understanding, the comparison between the apartment which the plaintiffs were building and the stock in trade *(which were cited on the website),* does not add up, when it is noted that the bank did not limit itself to relying upon only the proceeds from the sale of the apartments.

44. The bank required the 2nd plaintiff to provide a legal Charge over the suit property, and the said plaintiff obliged.

45. Therefore, I find, on a *prima facie* basis, that the plaintiff is not right to assert that the bank's security was only the apartments and the proceeds therefrom.

46. I agree with the plaintiffs, that the court cannot re-write a contract between the parties. Parties are bound by the terms of their contract.

47. And one aspect of the contract which the parties executed is the legal charge. Neither of the parties can be allowed to escape from the terms of the instrument of Charge.

48. Furthermore, the rights and obligations set out in the charge were not subject to any other contract. If the parties intended the charge to be subject to any other contract, they would have stated that in clear terms.

49. I find no basis in law or in fact, for holding, even on a *prima facie* basis, that the charge was conditional upon the finalization of the construction of the apartments which the plaintiffs were building on the suit land.

50. On a *prima facie* basis, it does appear that the value of the land, excluding the apartments, may have been insufficient to pay-off the facility which the bank had provided to the plaintiffs. To that extent, it can be said that the recovery of the facility which the bank provided was dependent on the sale and transfer of the apartments.

51. Nonetheless, I reiterate that the charge was not conditional upon the sale and transfer of the apartments.

52. I also find that if the plaintiffs had maintained an All Risk Insurance Policy, that too would have provided an added security to the bank.

53. The plaintiffs have concluded that the collapse of the buildings cannot be blamed upon any of the parties.

54. Meanwhile, the bank indicated that the collapse of the building may not be attributable to the plaintiffs. However, the bank preferred to wait for the Investigators to produce their Report, which would provide requisite reasons that caused the building to collapse.

55. On its part the Insurance Company which had provided the cover at some point in the process of construction, had now declined to release the Investigator's Report.

56. In view of the stance taken by the insurer, the plaintiffs did ask the court to compel the insurer to disclose the Investigator's Report.

57. It is my considered view that the plaintiffs' quest for the Investigator's Report, is an indication that the plaintiffs do not have material upon which they founded the conclusion that the collapse of the building was not attributable to them.

58. If the plaintiffs had a sound basis for its said conclusion, they would have placed the same before the court.

59. Furthermore, there was no agreement between the chargor and the chargee that the property which is the subject matter of the charge could only be realized if the chargor was blameworthy.

60. In the charge document, the 1st plaintiff is expressly cited as the *"Borrower"* or as *"the principal debtor"*. Those phrases are more in keeping with the relationship between a lender and a borrower, rather than as between persons who were joint partners in an investment.

61. At paragraph 12 of the Further Amended Plaint the plaintiffs said;

> **"The Bank's security was apartments and the proceeds therefrom. It is the proceeds from the sale and pre-sale of apartments that guaranteed the bank that the loan would be serviced".**

62. Clearly, the plaintiffs had recognized the existence of a loan, and the need to service the said loan.

63. At paragraph 17 of his Affidavit sworn on 7th April 2016, the 2nd plaintiff said;

> **"THAT on 8th February 2016 I wrote to the bank and requested for the restructuring of the loan, noting that the project had collapsed and I was now forced to pay the facility from my own pockets as opposed from sales from the units as had been previously anticipated.…"**

64. Based upon those unsolicited statements from the plaintiffs, I hold the considered view that they appreciated the fact that the bank had accorded them a loan facility, which therefore had to be serviced.

65. The plaintiffs have indicated that they were unable to service the facility because the building which they were relying upon, to get funds which they could then use to pay-off the facility, collapsed.

66. The result of the failure by the plaintiffs to service the facility was a default.

67. But, where is the plaintiffs' obligation to service the facility stipulated?

68. Pursuant to clause 2.7 of the *"Musharaka"* Agreement;

> **"The Client shall pay to the Bank the Monthly Payments in accordance with the Monthly Payments Agreement".**

69. And pursuant to clause 9.1 of the Musharaka Agreement, any time when the client does not pay on the due date, any amount of money which was payable, that constituted an Event of Default.

70. Therefore, on a *prima facie* basis, the bank had sufficient reason to warrant the issuance of;

a. **The Statutory Notice of its intention to sell the suit property; and**

b. **The information to the Credit Reference Bureaus.**

71. Indeed, once there was a default, the bank had no option but to provide the requisite information, concerning the plaintiffs, to the Credit Reference Bureaus.

72. In effect, I find that it would be wrong for the court to grant an injunction which would stop the bank from carrying out an obligation which had been imposed upon it by the law.

73. In any event, if the listing of the plaintiffs were erroneous, there is an elaborate procedure to be followed by the aggrieved persons, so as to resolve the issue.

74. The plaintiffs have not demonstrated to the court that they took the appropriate action in that respect.

75. Where the law provides specific mechanisms for the resolution of disputes, the court would be very slow to intervene, lest it be construed to be usurping the mandate bestowed on the specified organs.

76. Meanwhile, it needs to be clarified that when a party defaults in remitting payments, it is not necessary that the bank should first verify that the default was due to the fault of the party. It is possible for someone to be very conscientious and keen to remit payments in a timely manner, but he could still default.

77. In this case, the plaintiffs may or may not have been able to do something about the matters which led to his default. But even if the default occurred due to circumstances beyond the control of the borrower, it was still incumbent upon the lender to notify the Credit Reference Bureaus.

78. In conclusion, the plaintiffs have not established a prima facie case with a probability of success. Therefore, the application for interlocutory injunctions is dismissed.

79. The plaintiffs will pay to the defendants, the costs of the application dated 6th April 2016.

**DATED, SIGNED** and **DELIVERED** at **NAIROBI** this **3rd day** of **May** 2017.

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Miss Muraguri for the Plaintiff

Mulanya for the 1st Defendant

Miss Marienga for the 2nd Defendant

Collins Odhiambo – Court clerk.