



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 227 OF 2016

ZINGO INVESTMENT LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. The Motion before Court is for an Interlocutory Injunction. It is dated 14th June, 2016 and it is for the following prayers:-

- a) THAT this Application be certified urgent and be heard ex-parte in the first instance.
- b) THAT pending the hearing and determination of this application inter partes an order of injunction do issue restraining the Defendant from altering, changing and/or converting the terms of the facilities advanced to the Plaintiff, in the manner expressed in the Defendant's letter dated 12th May 2016 or in any manner whatsoever.
- c) THAT pending the hearing and determination of this application inter partes an order of injunction do issue restraining the Defendant from either by itself, employees, servants or agents from referring and/or listing the Plaintiff or any of its Directors' details with the Credit Reference Bureau (CRB), on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.
- d) THAT pending the hearing and determination of this Application inter-partes an Order of Injunction do issue restraining the Defendant either by itself, employees, servants or agents from demanding payment or exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect of all property known as LR No.9363/98 and L.R Nos.209/8628 on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.
- e) THAT pending the hearing and determination of this suit an order of injunction do issue restraining the Defendant from altering, changing and /or converting the terms of the facilities advanced to the Plaintiff, in the manner expressed in the Defendant's letter dated 12th May 2016 or in any manner whatsoever.
- f) THAT pending the hearing and determination of this suit an order of injunction do issue restraining the Defendant from either by itself, employees, servants or agents from referring and/or

listing the Plaintiff or any of its Directors' details with the Credit Reference Bureau (CRB), on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.

g) THAT pending the hearing and determination of this suit an order of injunction do issue restraining the Defendant either by itself, employees, servants or agents from demanding payment or exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect of all property known as LR No.9363/98 and L.R Nos.209/8628 on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.

h) THAT the costs of this Application be provided for.

2. Because of the requirements of the Principles in **GIELLA VS. CASSMAN BROWN**[1973] EA 358 which sets out the conditions for the grant of an Interlocutory Injunction as being:-

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenient,

this Court must, as a first order of business, assess the viability of the Plaintiff's case. But as it does so it is minded that this interlocutory session is not the occasion to make any firm findings that may embarrass the Trial Court.

3. Although the Plaintiff's case is set out in 49 paragraphs running into 12 pages, the dispute can be unpacked into a much more concise form.

4. It is common ground that National Bank of Kenya Limited (**The Bank**) granted certain facilities to Zingo Investment Limited (**Zingo**). The facilities were offered and taken through 3 Letters of offer dated 28th March, 2014, 29th September, 2014 and 5th May 2015. The facilities were a Development Loan, take over of the Plaintiff's debt at Kenya Commercial Bank and working Capital and pre-shipment finance. The letter of offer of 5th May 2015 puts the facilities at a total of Khs.2,000,000/- and USD 5,338,000.

5. The following securities were created in respect to the aforesaid facilities,

- Charge for USD 882,354 over L.R NO.209/8628.
- Charge for USD 2,238,000.00 over L.R No. 9363/98.
- Floating Debenture for a maximum principle amount of USD 794,000.
- Joint and several guarantees of USD 3,476,000.00 by the Directors of the Plaintiff.

6. Part of the facility was to finance the development of LR. No.9360/98, a premise of the Plaintiff. It is said that the construction proceeded well and was completed in August 2014 to the satisfaction of the Defendant and the premises handed over to the Plaintiff.

7. The Letter of Offer of 5th May 2015 was on the basis of a request by the Plaintiff for further pre-shipment working capital. It would appear that the Plaintiff's business from China was flourishing and it needed further support of the Bank. In particular the Plaintiff had procured 3 contracts with China National Light Industries Products Import and Export Technical Services Company Ltd worth USD 1,584,000(**hereinafter also referred to as the Chinese Contracts**)

8. The Plaintiff's position is that the payment of the 3 Contracts was to be by way of Letters of Credit. But the Bank does not agree. In the Replying Affidavit sworn by Ms. JeldonNjenga, she avers that two Contracts of USD 132,000 each were to be financed by irrevocable Letters of Credit and one of USD

1,320,000 was by way of cash against documents and therefore not affected by Letters of Credit. For now, this Court leaves those rival positions to the resolution of the Trial Court as the determination of Motion before Court does not turn on it.

9. It is the Plaintiff's position that the Defendant had mismanaged the opening of Letters of Credit with the result that the arrangements were not completed and the contract periods lapsed. On 12th October, 2015, China Light wrote to the Plaintiff expressing dissatisfaction at how the Plaintiff had handled its orders and on 26th October 2015 terminated the Contract and claimed damages of USD 268,272.00.

10. But the Plaintiff complains of even further loss. The main business of the Plaintiff is Tannery and it deals with the Export of Wet Blue and Finished Leather. The Plaintiff's case is that so as to service the Chinese Contract it had prepared and processed some material. But because the contracts fell through, the materials which comprised Wet Blue Leather decomposed and in compliance with directives from the Public Health Authorities the materials were destroyed. The Plaintiff puts the value of the wasted materials at USD 1,584,000.00.

11. On its part the Bank does not attribute the deterioration of the material to the cancellation of the Contracts. It asserts,

“That indeed the alleged deterioration was of material bought between June and July 2015 well before the Plaintiff entered into the Contract in the month of August 2015 with China Light for lack of diligence on the part of the Plaintiff while some of the raw materials were bought as rejects”

Again, this Court would rather have this matter reserved for determination at Trial.

12. Finding themselves in this difficulty, the Plaintiff on 15th October 2015 requested for temporary facilities to help it in financing its business, waiver of interest and extension of the repayment of some facilities to enable it recover from the loss suffered as a result of the cancellation of the Chinese order. On 22nd November 2015 the Plaintiff tendered its application for Restructure and additional working capital but this was rejected by the Bank on 21st December 2015.

13. That rejection aggrieved the Plaintiff who through its Advocates, Kinyua Muriithi & Co. Advocates, on 21st December 2015, wrote to the Defendant seeking an admission of Liability for the loss incurred by the Plaintiff. Things were now moving very quickly.

14. On 13th December 2015, the Bank responded to the Plaintiff's Lawyers Letter of 21st December 2015, in which it reiterated its demand of 22nd November, 2015.

15. On 22nd December 2015, the Bank issued a Demand Letter to the Plaintiff calling for the payment of loan arrears within 14 days. In that Letter, the Bank threatened to invoke the provisions of The Banking (Credit Reference Bureau) Regulations 2008 and make a negative Report of the Plaintiff to a Credit Reference Bureau.

16. On 18th January 2016 the Defendant issued yet another letter seeking payment of arrears of USD 579,376.61 and Euro 5.67.

17. In the Supporting Affidavit of Mr. Robert Njoka Muthara, the Plaintiff avers that on or about 10th February, 2016, it received a communication from the Bank offering to review the Plaintiff's facilities by amalgamating them and proposing a repayment period of ten (10) years and moratorium of four (4) months on principal and interest. No offer was made of the additional finance that had been requested by the Plaintiff. The Plaintiff avers that as it was entirely at the mercy of the Defendant, it executed the Letter of Offer.

18. The Bank maintains that the Plaintiff entered the new Contract willingly and on its own volition.

19. This suit was triggered by a Letter dated 12th May 2016. In it the Defendant communicated to the Plaintiff an intention to convert facilities denominated in US Dollars to Kenya Shillings effective from 23rd June 2016 and with an increase in interest from 9.87% to 22.5%. The Plaintiff sees this as being contrary to the Facility Agreements and seeks the following prayers in the Plaint:-

- a) Declaration that the Defendant is in breach of its duty and obligations under the facility letters and loan agreements.
- b) A Declaration that the Plaintiff and its Directors are under no obligation to make the loan repayments on account of the Defendant's breach of its duty and obligations under the loan agreement.
- c) A Declaration that the Defendant is liable for the losses sustained by the Plaintiff to the tune of USD 10,898,920.00.
- d) An order requiring the Defendant to compensate the Plaintiff for the loss of USD 10,898,920.00.
- e) An order of injunction restraining the Defendant from altering, changing and/or converting the terms of the facilities advanced to the Plaintiff, in the manner expressed in the Defendant's letter dated 12th May 2016 or in any manner whatsoever.
- f) An order of Injunction restraining the Defendant from either by itself, employees, servants or agents from demanding payment or exercising any statutory power of sale, either by public auction or private treaty and/or otherwise advertising, commencing or proceeding with any realization process in respect of all property known as LR No.9363/98 and L.R Nos.209/8628 on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.
- g) An order of injunction restraining the Defendant from either by itself, employees, servants or agents from referring and/or listing the Plaintiff or any of its Director's details with the Credit Reference Bureau (CRB), on account of any loan facility advanced to it by the Defendant that forms the subject matter of this suit.
- h) An order of mandatory injunction directing and/or compelling the Defendant to release and/or unconditionally discharge all securities it holds on account of the loan facilities advanced to the Plaintiff including but not limited to:
 - i. Discharge of title LR No.9363/98 and LR.Nos 209/8628
 - ii. Discharge of the Directors from any liability arising from any guarantees executed pursuant to any facilities advanced by the Defendant and which forms the subject of this suit.
 - iii. Debenture dated 15th September 2013 over the Company assets.
 - iv. Guarantees by the Directors.
- i) General Damages.
- j) Costs of this suit.
- k) Interest on (c), and (b) at Court rates.
- l) Such other or further relief as this Court may deem fit.

20. The Plaintiff and Defendants Counsel filed written Submissions in support of their Client positions. This Court has considered those arguments.

21. The Plaintiff blames the Bank for the cancellation of the Chinese Contracts and the losses associated therewith which are set out as follows:-

- (a) Loss of USD 1,584,000 being value of the material destroyed.
- (b) USD 268,742.00 being damages claimed by China Light.
- (c) USD 9,046,178.00 being the loss of Business on the Chinese Contracts.

22. The position taken by Bank is that on 10th February 2016, the Plaintiff unconditionally admitted the debt without any reservations and undertook to repay it in the Letter of Offer. On the other hand, the Plaintiff states that it entered into this arrangement because it was at the mercy of the Bank.

23. This Court understands the Plaintiff to be saying that it executed the Letter of offer of 10th February 2016 because it lacked the bargain to decline and or because of undue influence on the part of the Bank. Yet if that is the Plaintiff's case then it has not pleaded the particulars thereof as required by Order 2 Rule 10(1) of The Civil Procedure Rules which provides;-

“(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —

(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies”.

24. It seems to me that as the Pleadings stand, the Plaintiff will be hard put to make out a case that it did not freely or willingly enter into the new contract which is embodied in the Letter of Contract of 10th February 2016.

25. The Letter of Contract of 10th February 2016 is of singular importance to this dispute because this amounted to a re-arrangement of the relationship between the Plaintiff and the Bank. It came after the debacle that the Chinese Business had turned out to be and even after the Plaintiff had taken the position that it is the Bank that bore the responsibility for the loss that ensued therefrom. See for example the Plaintiff's Lawyers Demand Letter of 25th December 2015 asking the Bank to admit liability for the losses occasioned to the Plaintiff.

26. It can be argued with some force, that by entering the Contract of 10th February, 2016, both parties to the contract had compromised whatever positions they may have been taken prior to that date. It is for this reason this Court thinks it unnecessary to make any findings in respect to the many arguments made by Counsel on both sides of the divide as to who was responsible for the cancellation of the Chinese Contracts.

27. The Letter of Offer of 10th February 2016 reviewed the Letter of Offer of 5th May 2015 and amended it as follows:-

(i) The Facilities granted:

Mortgage Facility – USD 5,394,474.20

Insurance Premium financing – Kshs.1,333,893/=

(ii) Purpose: To re-align the facilities by amalgamation of all facilities.

(iii) Tenor: 120 months with four months moratorium period on principle and interest.

(iv) Pricing/interest: Interest on term loan charged at 3 months libor (0.621%) and 8.8790% with floor rate 9.5% p.a

28. The Letter of 12th May 2016 communicated to the Plaintiff an intention to convert the facilities denominated in US Dollars to Kenya shillings and to price the facility at 27.50% interest with effect from 23rd June 2016. This decision is explained as follows by the Bank:-

“....the Defendant was unable to maintain the Plaintiffs US Dollar account which had no inflows and the interest rate had to automatically change upon conversion and in any event it is very costly to maintain a US dollar Account while the Plaintiff continued to act and breach the banking covenants (sic)”

29. The Court has had a difficulty understanding the stance taken by the Bank on the issue of breach because the contract of 10th February 2016 had offered a respite to the Plaintiff for 4 months. That four month was to end on or about 10th June 2016. Or was the Bank foretelling breach? It would seem that the Letter of 12th May 2016 was pre-mature.

30. However, on 21st June 2016, this Court granted the following protective orders to the Plaintiff pending the hearing and determination of this motion:-

(i) It stayed any realization process.

(ii) No negative report to the Credit Reference Bureau of the Plaintiff was to be sent by the Defendant.

(iii) The currency conversion and increase in rate of interest was stayed.

In effect the terms of the impugned letter of 12th May 2016 were not implemented.

31. In view of the supposed compromise of 10th February 2016, the Plaintiff has not made out a prima facie case that the Bank is any longer liable (if ever it was!) for the cancellation of the Chinese Contracts and any attendant and/or consequential losses that the Plaintiff may have incurred. Now that the moratorium of 4 months granted under the contract is long gone, the Bank cannot be restrained from enforcing whatever rights it may have under the terms of the contract or statute if there is default.

32. I must nevertheless observe that neither Counsel addressed Court as to where in the contract or statute, the Bank drew a right to effect the currency conversion as a redress to default. The Bank will have to be minded whether this, in fact, is a course it can take in the event of default.

33. Otherwise, for reasons given the Notice of Motion of 14th June 2016 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 15th day of June, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Muchoki h/b Wesonga for Plaintiff

Chege for Defendant

Alex - Court clerk