



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 647 OF 2015

JARIBU CREDIT TRADERS LIMITED.....PLAINTIFF

-VERSUS -

FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT

RULING NO.3

1. The application before me is for interlocutory injunctions to;
 - a. **restrain the defendant from taking steps to realize the security; and to**
 - b. **restrain the defendant from appointing a Receiver over the assets of the plaintiff, or from referring the plaintiff to the Credit Reference Bureau.**
 - c. **The plaintiff also sought a Permanent Injunction to restrain the defendant from either appointing a Receiver or from referring the plaintiff to a Credit Reference Bureau.**
2. Thirdly, the plaintiff sought orders to compel the defendant to provide properly reconciled accounts, after removing all amounts which had been levied illegally.
3. It is common ground that the plaintiff obtained credit facilities from the defendant.
4. The plaintiff asserts, in its submissions, that it has been remitting monthly instalments to the bank, to service the credit facilities.
5. However, the bank insists that the plaintiff had not been regular in the remittance of the monthly instalments.
6. The easiest way of ascertaining the truth is through a perusal of the statement of account.
7. The plaintiff did not provide either the statement of account or copies of deposit slips, to demonstrate the payments it was making.
8. On the other hand, the bank provided a copy of the plaintiff's statement of account, which showed that from June 2015, the plaintiff did not make payments into its account. The plaintiff did not challenge the accuracy of the information, concerning the repayments.
9. Its challenge to the statement of account was that the defendant had levied illegal interest, penalties and

illegal penalty charges.

10. Even assuming that the plaintiff could ultimately prove that some of the interest charged was illegal, and that the penalties and penalty charges were illegal, that cannot justify the plaintiff's failure to remit the monthly repayments.

11. It is the party who is seeking relief who is under a legal obligation to prove its case. Of course, at this interlocutory stage, the plaintiff need only prove its case on a *prima facie* basis.

12. In the absence of evidence to show that the plaintiff was making regular monthly instalments, of a magnitude sufficient to meet the contractual obligations, I find that the plaintiff has not demonstrated that it was meeting its obligations.

13. A bare statement by the plaintiff, asserting that it was paying monthly instalments as they fell due, is not evidence. It is a claim.

14. And because the plaintiff failed to provide evidence to support the claim, it remains unsubstantiated. The said unsubstantiated claim, contention or assertion cannot advance the plaintiff's case.

15. Pursuant to Section 63 (c) of the Civil Procedure Act;

“In order to prevent the ends of justice from being defeated, the court may if it is so prescribed, grant a temporary injunction....?”

16. There is therefore an express statutory pronouncement, that courts may grant temporary injunctions for purposes of preventing the defeat of the ends of justice.

17. And as the plaintiff submitted;

“The guiding principles, rules and conditions for grant of the remedy are well established and settled.?”

18. What are those well established and settled principles?

19. Once again, the plaintiff captured the same very aptly by the following quotation from the words of Spry VP in the case of **GIELA Vs CASMAN BROWN & Co. LIMITED [1973] E.A 358, at page 360;**

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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, it will decide an application on the balance of convenience?.”

20. In an endeavour to show a *prima facie* case, the plaintiff submitted that there is a dispute about the fact that the bank was levying illegal interest, penalties and penalty charges; and that the plaintiff was paying monthly instalments.

21. The existence of a dispute concerning those issues is not proof of the facts.

22. The plaintiff further submitted that land is unique, so that no one parcel can be equated in value to another.

23. In my considered opinion, that assertion is inaccurate. I say so because processes such as those of the valuation of properties, for purposes of either sale or for mortgage, actually rests on comparisons of properties. The location, size and developments on the properties are relevant factors when determining values; and in many instances it is possible to equate properties.

24. Indeed, that is why the plaintiff went on to state thus;

“Though the value of the property can be ascertained...?”

25. It cannot be true that although it was possible to ascertain the value of the suit property, the value was so unique that it was not possible to equate it to any other property.

26. I also find that once the value of the property was ascertainable, it was possible to compensate the proprietor by payment of the appropriate value.

27. It must be borne in mind that it is the plaintiff who offered the property as a security, in respect to the financial facilities which the plaintiff sought from the defendant.

28. By so doing, the plaintiff must have given a consideration to the value of the property vis-a-vis the value of the financial facilities which it was seeking.

29. Similarly, the bank must have accepted the security because it was deemed capable of cushioning the bank in respect to the facilities which were being given to the plaintiff.

30. In effect, both parties were equating the property to the financial facilities. The property was deemed as being adequate in value, to be security for the funds which the bank was providing.

31. If the value of the property was not considered commensurate with the facility being sought by the plaintiff, the bank would not have released the funds to the plaintiff.

32. By offering the property as security to the bank, the plaintiff was saying that if it failed to honour its obligations, the bank would be entitled to realize the security or to appoint a receiver.

33. In this case, the statement of account tells a story of a plaintiff who was not making regular monthly instalments. Therefore, I cannot understand how the plaintiff expects the court to allow that state of affairs to continue.

34. And when an account was not performing, the bank is under a statutory obligation to provide to the Credit Reference Bureau, the Credit Information concerning a defaulting customer. That obligation is imposed upon the bank by Section 25 of the Banking Act, as read together with the Credit Reference Bureau Regulations, 2013.

35. It would therefore be wrong for the court to grant orders which would bar the bank from discharging its statutory function. Accordingly, the court rejects the application for an injunction to restrain the defendant from notifying the Credit Reference Bureau about the credit rating of the plaintiff.

36. As regards the request for an order to compel the defendant to provide properly reconciled accounts, I hold the view that such order could only issue after the court had conclusively analysed the statements of account and had concluded that it contained debits which were illegal, unlawful or unjustified. At present, the plaintiff has not provided the court with sufficient material, upon which the court could draw up the conclusions that could lead to an order for the provision of a properly reconciled statement of account.

37. In answer to the application, the defendant largely dwelt on the position concerning the appointment of a Receiver over the affairs of the plaintiff.

38. However, the defendant did not provide an affidavit to show that it had already appointed a Receiver. To that extent, therefore, the defendant's submissions are not founded upon factual evidence. In the circumstances, I choose to make no comments on the issue of the receiver.

39. In conclusion, the plaintiff failed to establish a prima facie case with a probability of success.

40. Secondly, the plaintiff failed to demonstrate that it would suffer irreparable loss and damage, which cannot be compensated by award of damages.

41. The result is that the plaintiff's application dated 18th December 2016 is dismissed with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Byaruhanga for the Plaintiff

Amuga for Oyuke for the Defendant

Mr. C. Odhiambo, Court clerk.