REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

MISC.CIVIL APPLICATION NO. 639OF 2015

ALMA TRADING COMPANY LIMITED.............................PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LIMITED..........................DEFENDANT

RULING

1. The application for determination is a Notice of Motion dated 9th November, 2015, brought under Order 40 Rules 1, 2, & 4 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of the law. The Plaintiff has sought for the following orders against the Defendant ;-

a. ***Spent***
b. ***Spent***
c. ***Pending the hearing and determination of this suit, an injunction do issue restraining the Defendant/Respondent its servants and/or agents or otherwise howsoever be restrained from repossessing, selling, alienating, disposing or in any other way whatsoever dealing with all the motor vehicles within Alama Trading Company Limited, hereinafter referred to as the Motor car bazaar.***
d. ***That the Officer Commanding Central Police (OCS) be directed to enforce and ensure full compliance with the court orders herein.***
e. ***The costs of this Application be awarded to the Plaintiff/Applicant.***

2. The application is based on the grounds contained in the application supported by the affidavit Ali Ibrahim Kontoma sworn on 9th November, 2015. It was deponed that the Plaintiff and the Defendant were in a bank and customer relationship, where the Defendant extended various loan facilities to the Plaintiff.
3. That vide a Finance Agreement (Investment Musharaka) the Defendant agreed to advance the Plaintiff a facility of Kshs. 40,000,000/= whereby proceeds from the sake of the motor vehicles sold by the Plaintiff would be shared on an agreed ration between the parties.
4. Repayment of the loan facility would be on an annual basis within a period 60 months. It was contended that the Kshs. 7,200,000/- and Kshs. 6,200,000/- has already been paid to the Defendant being the profit for the 1st year and 2nd year as agreed. However, it was the Plaintiff's contention that during the third year of the agreement, the Defendant changed the terms and conditions of the Finance Agreement whereby the Plaintiff was required to remit profits of Kshs. 1,100,000/= on a monthly basis.
5. It was the Plaintiff's position that despite the hardship that this caused, it complied with the same and remitted the aforestated amounts via RTGS system from January 2015 to September 2015.

Nevertheless, the aforesaid repayments became impossible on the part of the Plaintiff in the month of October, 2015 due to external economic factors.

6. That thereafter the Defendant through its letter dated 30th September, 2015 informed the Plaintiff that it had an outstanding principle of Kshs. 34,001,424.71/= which should be settled. Further, it was contended that the Defendant further threated to have the Plaintiff auctioned for the Defendant to recover the unpaid amount. It was asserted by the Plaintiff that if the orders sought are not granted it will suffer irreparable loss and damage. The Plaintiff therefore urged the court to allow the application as prayed.
7. In reply to the application, the Defendant filed the affidavit of George Obiko sworn on 7th December, 2015. It was the Defendant's contention that the application by the Plaintiff lacked merit. The deponent stated that Plaintiff approached the Defendant for a loan facility, and via a letter of offer dated 14th June, 2012, the Defendant offered the Plaintiff Kshs. 40,000,000/=.
8. That the Plaintiff accepted all the terms and conditions of the Financing Agreement which included registration of a fixed and floating debenture of Kshs. 40,000,000/= over all the assets of the Plaintiff. The Plaintiff's directors were also required to execute a joint and several deeds of guarantee. The Defendant further stated with the concurrence of the Plaintiff , terms of the facility in question were reviewed vide a letter of offer dated 31st July, 2013, where the Plaintiff agreed to repay the loan amount in monthly installments of Kshs. 1,100,000/= being the principal and profit.

9. It was contended that the Plaintiff subsequently started defaulting on the loan in breach of the letter of offer and debenture, prompting the Plaintiff through its letter dated 25th August, 2015 to request for a waiver of the monthly profit contribution. The Defendant however responded to the same through a letter dated 30th September, 2015 asking for supporting documents to prove that the Plaintiff in Company was indeed incurring losses.
10. That I light of those circumstances, the Defendant was well founded in trying to realize the security it held under Clause 10 of the Capital investment agreement and Clause 6.1(a) of the Floating Debenture. On this basis, the Defendant contended that the Plaintiff had failed to meet the threshold set for the grant of an injunction.
11. That further the Plaintiff failed to make material disclosures to the court with regard to letter to the defendant dated 25th August, 2015 requesting for a waiver of the monthly repayments. The Defendant therefore urged the court to dismiss the application with costs.
12. The Plaintiff in rebuttal to the Defendant's reply, filed the supplementary Affidavit by Ali Ibrahim Kontoma sworn on 10th March, 2016. The Plaintiff did not deny that it requested it wrote to the Defendant on 25th August, 2015 but was firm that it only requested for the reduction of the monthly repayments from 1,100,000/= to Kshs. 600,000/=.
13. That further, the Defendant had failed to honour its promise that it would source for clients for the Plaintiff, and therefore it was not proper for the Defendant to threaten to attach the its assets. Further to this, the Plaintiff argued that it had made all necessary disclosures to the court while making this application. That if the orders sought are not granted and the Defendant, is allowed to attach its assets, the Plaintiff's car import business would be crippled.
14. The application was dispensed by way of written submissions. The plaintiff filed its written submissions on 18th March, 2016 while the Defendant filed its submissions on 11th March, 2016. I have considered the pleadings, depositions, rival submissions and the various cases cited by Learned Counsel to the respective parties.
15. This being an application for injunction, it is vital to point out that the principles that guide the court when considering an application for an injunction are set out in the case of **Giella –v- Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss; and that if the court is in doubt, it will decide the said application on a balance of convenience.
16. Further, it is of note that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial.
17. As such, I find that the issues that fall for determination is whether the Plaintiff has placed enough material before the court to persuade it to grant the interim orders sought.The first question I must therefore answer is whether the Plaintiff has established a prima facie case.

18. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** as follows:

> ***"a prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."***

19. The Plaintiff argued that they had established a prima facie case with a probability of success. According to the submissions of its learned counsel, it was implied in the working capital finance agreement that the parties herein were in business together and inter alia the profit realized from the proceeds of sale would be shared.
20. That in the foregoing, the Parties were in a business relationship whereby the Defendant was a financier and the Plaintiff would run the day to day affairs of the company. It was the Plaintiff's assertion that the Defendant changed the terms of the Finance agreement by stating that it would pay profits on a monthly basis as opposed to the annual basis.
21. The defendant on the other hand, argued that the Plaintiff had failed to establish a prima facie case since the Plaintiff did not deny being indebted to it. That further the letter of offer was clear that in the event of the Plaintiff's default, the Bank reserved the right to dispose off the securities held.
22. I have considered the rival submissions. It is not in dispute that the parties herein are in a bank customer relationship, where the Defendant provided certain loan facilities to the Plaintiff. This court must assess the instrument used to create the relationship. To my mind, this are the letters of offer dated 14th June, 2012 and 31st July, 2013 including the Fixed and Floating Debenture dated 4th July, 2012. Both the debenture and the letter of offer dated 14th June, 2012 indicate that the loan facility advanced was in the amount of Kshs. 40,000,000/=. Paragraph 2.1 of the Debenture indicates that the covenant to pay is pegged to the Facility letter.
23. I have duly examined the said letter of offer dated 14th June, 2012, and the same indicates that the profit realized by the Plaintiff shall be shared between the Bank and the Client at a ratio of 80% to 20%. That is at Kshs. 7,200,000 annually. The position however changed in 31st July, 2012 when the Plaintiff had to remit Kshs. 1,100,000 on a monthly basis.
24. According to the Plaintiff, owing to bad times, the Plaintiff was unable to make the monthly repayments after September, 2015 and was thus in arrears. These are the uncontested facts. In my opinion, the Plaintiff does not deny being indebted to the Defendant. What then, was the agreement between the parties in case of default by the borrowers ?
25. According to Clause 10 of the letter of offer dated 14th June, 2012, in the event of the Client being in default of the payment of the due share of the profit or performance of any of the covenants under the Agreement, the Defendant Bank has the right to dispose of the facilities. There is no controversy about the fact that the Defendant would like to exercise its powers under the debenture to foreclose realize the security it holds and offset monies owing to it.
26. However under Clause 6 of the Debenture, upon the default of the Borrower, the Bank was required to issue a demand for the amounts due and owing in order for the secured obligations to become due and payable on demand. Given this clause, it is clear that in the event of a default of payment, it was incumbent for the Defendant to demand the monies owed from the Plaintiff.
27. I have looked at the court record including the documents attached to the application as well as the Defendant's replying affidavit. No written demand of the nature I have describedhas been presented to the court. What I have seen is the letter by the Defendant dated 30th December 2015. The same reads as follows;

> ***"30th September, 2015***
>
> ***The Directors,***
>
> ***Alama Trading Company Limited***

Bunyala Road/Off Uhuru Highway

Opp. Oil Libya Petrol Station

P.O.BOX 2571-00200

<u>NAIROBI – KENYA</u>

Email:alamatraders2011@yahoo.com

Attn: Ali Ibrahim Kontoma

Dear Sir,

<u>RE: EQUITY/WORKING CAPITAL FINANCE AGREEMENT (INVESTMENT MUSHARAKA) TO ALAMA TRADING COMPANY LTD.</u>

We refer to your letter dated 25th August, 2015 and address as below.

- ***The bank is in business the same as Alama Trading Company Limited with the aim of generating profit.***
- ***The Principle amount granted to yourself was Kshs. 40,000,000/- repayable in 60 months with monthly installment of Kshs. 1,100,237.44 being principle plus profit***

You were advised to bring supporting documents regarding the Loss that the company incurred could not be justified as even after issuing you with a letter regarding the same.

We therefore advice that the Principle Outstanding amount of Kshs. 34,001,424 be cleared before addressing the profit matters.

In case of any query, don't hesitate to contact the undersigned.

Yours faithfully,

For: First Community Bank Ltd

Mohamed Tahir

Remedial Officer"

28. To my mind the above lettercannot be construed to be a demand as contemplated in clause 6 of the Debenture. It was simply a request for the Plaintiff to pay Kshs. 34,001,424/= pending any negotiation with regard to the repayment plan. Therefore, though the Plaintiff herein admitted default of the loan facility, it was incumbent for the Defendant to demand the monies owed from the Plaintiff before commencing any form of realization of the held securities.
29. A notice, in form of a demand of default was therefore essential as outlined in Clause 6 of the Debenture. In this case, the defendant has not denied that it did not notify the plaintiff of its default.
30. Therefore the issuance of any notices of proclamation were in my assessment premature. I therefore find that the Plaintiff in this case has made out a prima facie case to warrant a temporary injunction pending the issuance of requisite demand as contemplated by the clause 6 of the debenture.

31. Accordingly, I grant an injunction to the extent stated above.

Written, dated and signed at Nairobi this 5th day of May 2016.

C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

O. SEWE

JUDGE