REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISIONS

CIVIL CASE NO 3 OF 2016

STANLEY NJOGU HOSEA KARARI

T/A MONACO ENGINEERING LTD…….......……PLAINTIFF/APPLICANT

VERSUS

STANDARD CHARTERED BANK LTD……DEFENDANT/RESPONDENT

RULING

1. For the determination of the Court is the application by the Plaintiff dated 6th January 2016 and filed on 11th January 2016. The application was brought pursuant to Order 51 Rule 4 of the Civil Procedure Rules, as well as Sections 1A, 1B & 3A of the Civil Procedure Act, and Rule 3(1) of the High Court Practice & Procedure Rules. The Applicant sough the following orders *inter alia*;

1. ***Spent***
2. ***THAT this honourable Court pending the hearing and determination of this application, do grant orders immediately stopping the further attraction of interest rates or restraining the Defendant/Respondent, their representatives, servants and/or agents from imposing further interest upon the Plaintiff/Applicant, on the suit account.***
3. ***THAT this honourable Court pending the hearing and determination of this application, be pleased to grant an order for injunction restraining the Respondent/Defendant, their representatives, servants and/or agents from realizing its security by sale of the secured property being Title No Nairobi/Block 82/4785 duly provided as collateral by the Applicant/Plaintiff.***
4. ***THAT this honourable Court pending the hearing and determination of this application be pleased to compel immediately the Respondent/Defendant to regularize the Applicant/Plaintiff's position at the Credir Reference Bureau to reflect a clean bill of financial health succinctly stating that the Applicant/Plaintiff's are not NOT credit defaulters as has been assumed in the case.***
5. ***THAT the Defendant/Respondent during the pendency of the hearing and determination of his application do compensate the Applicant/Plaintiff for the substantial loss of business and reputation suffered this far, as consequence of circumventing statutorily recognized banking practices in line with the Banking Act (Cap 488) Laws of Kenya and as supervised and regulated by the Central Bank of Kenya.***
6. ***THAT the Court be further pleased to make a declaration that the Respondent/Defendant in circumventing relevant statutory instruments fundamentally breached the succinct terms and conditions cited in the facility agreement entered into with the Applicant/Plaintiff in so far as interest rates and the posting of accurate statement of accounts are concerned.***
7. ***THAT this Court be pleased to make such other or further orders as are deemed to be just and***

expeditious for the singular objective of satisfying the ends of justice herein.

8. ***THAT this honourable Court be pleased to make the requisite orders in respect of the costs of this application.***

2. The grounds upon which the application were predicated were that the Applicant and Respondent had executed a banking facility on 30th April 2014 for Kshs 9,600,000/-. This facility was an overdraft facility which rate of interest was agreed upon of 18% but which the Respondent allegedly unilaterally varied from 26% to 21.84% to 23.79% and 40.52%.
3. The overdraft facility was later converted to a term loan of two (2) years repayable at the interest rate agreed upon of 15.9%, but which agreement the Respondent disregarded and charged interest at 24% per annum. It was contended that by breach of the agreed terms and the generation of questionable financial statements by the Respondent, the Applicant lost international developmental funding from multinational and has suffered general loss of commercial reputation and hence loss of business. The application was further supported by the affidavit of the Applicant, which amplified the grounds as raised in the application.
4. The application was opposed through the Respondent's replying affidavit sworn and filed on 29th January 2016. It was admitted that the Respondent had extended an overdraft facility to the Applicant on 30th April 2014, which facility was later converted to a term loan on 29th September 2014 at the further request of the Applicant.
5. It was reiterated that the Applicant had on several occasions exceeded the overdraft facility of Kshs 9,600,000/- thereby occasioning additional interest charges on the facility that was not provided for in the exhibits presented by the Applicant. Further, it was contended that the Respondent issued regular statements of account to the Applicant, and in which any errors had been corrected to reflect the true state of accounts.
6. It was admitted that on 21st October 2014, the sum of Kshs 9,600,000/- was credited as to clear the overdraft facility, and further, that there was an error on the interest rate charged on the term loan as 24% which had been the rate of interest of the overdraft facility, instead of 15.9%. Further, the Respondent admitted that there had been an error of an overcharge on the loan term in November 2014, but which error had been rectified on 16th November 2015.
7. It was reiterated that the Applicant had defaulted in making repayments on the term loan and as at 21st January 2016, had an outstanding debt of Kshs 7,368,031.55. It was thereby, the Respondent's contention that they are entitled to issue statutory notices to mature the right to realize the security for the debt owed by the Applicant.
8. I have considered the application, the replying affidavit, grounds of opposition and the various dispositions made by the respective parties. What is in dispute between the parties is, to my mind, the rate of interest. It was the Applicant's contention that the Respondent had applied terms and rates of interest that had not been agreed upon. Further, it was alluded to that the Respondent had made unilateral applications with regards to rates of interest that the parties had not agreed to, and further, that there were mutual terms that had been agreed upon that the Respondent had disregarded.
9. However on its part, the Respondent reiterated that indeed there had been a misapplication of the agreed rate of interest, and that any overcharged amount had been credited to the Applicant, and any error rectified. It was finally submitted that the record of statements reflected the correct state of affairs of the Applicant's term loan, and that therefore, there was an outstanding amount to be claimed and/or against and/or settled by the Applicant.
10. It is in agreement between the parties that there were facilities that were offered to the Applicant on 30th April 2014. These facilities constituted an amendment and restatement of a previous facility issued on 11th April 2013. However, these facilities were further amended on 29th September 2014. It was reiterated in the facility letter inter alia;

> ***"All securities executed pursuant to the previous facility letter dated 30th April 2014 shall remain in full force and effect to secure the obligations of the borrower to the bank under this facility letter unless otherwise agreed by the bank and the borrower."***

Further the facility letter provided that the interest rate would be 15.9% as provided under Clause 3,

in which it was stated;

> ***"The borrower shall pay the interest to the bank at a variable rate of Kenya Banks Reference Rate (KBBR) plus a margin (i.e. currently 9.13% + 6.77%=15.9% per annum) calculated on daily loan balances and payable monthly in arrears. KBBR is reset by the Central Bank of Kenya and is currently 9.13%.***
>
> ***N/B***
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> ***The margin can be varied by the bank from time to time and comprise of (i) administrative overheads, (ii) financial tax (cash reserve ratio, deposit insurance premium), (iii) credit risk premium, (iv) profit margin, (v) costs of funds in excess of KBBR."***

11. In its letters dated 3rd September 2014 and 15th January 2015, the Applicant complained to the Respondent of the exorbitant interest rates that were levied against the term loan. It was contended that the same was exploitative and unsustainable, and further, sought a longer term of thirty-six (36) months to repay the term loan instead of the twenty-four (24) agreed upon on 24th September 2014. In response to this letter, the Respondent replied on 16th September 2015 and further on 26th October 2015 with regards to the issue of interest. In the former, it was stated that;

> ***"As advised when we met on July 27, 2015, the agreed rate of interest on the term loan was 15.9%. However, our mutual client had been servicing an overdraft facility with an interest rate of 24%. Inadvertently, the applicable rate on the term loan was not updated in our system.***
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> ***Please note that we have since recalculated the additional interest charged on the term loan. The additional amount charged was the sum of Kenya Shillings Four Hundred and Fifty Six Thousand Three Hundred and Twelve and Forty Two Cents (Kshs 456,312.42). As agreed, this sum has been credited to our mutual clients term loan account. The outstanding balance on the term loan as at September 16, 2015 is Kenya Shillings Seven Million and Three Thousand Two Hundred and Thirty Three (Kshs 7,003,233/-).***
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> ***We also confirm that our system has been updated to reflect the correct applicable rate of interest on the term loan as 15.9%"***

The letter dated 16th September 2015 was a follow up to an email that had been sent to the Applicant on 22nd January 2015, in which the Respondent had admitted that there had been an error in the system.

12. Further in a letter dated 24th February 2015, the Respondent had advised the Applicant that the rate of interest would be reviewed in line with the Kenya Banks Reference Rate (KBBR) to apply to credit facilities as from 25th March 2015. The rate had been reduced by the Central Bank of Kenya from the then 9.13% to 8.54% per annum.
13. On 24th June 2015 and 15th September 2015, the Respondent wrote to the Applicant, demanding the repayment of the outstanding monthly instalments. On 23rd September 2015, the Respondent wrote a letter stating that they intended to, in accordance with Regulation 50(1) of the Credit Reference Bureau Regulations 2013, proceed to list the Applicant with the Credit Reference Bureau (CRB) if the loan continued as non-performing. On 27th November 2015, the Applicant was served with the Ninety (90) days statutory notice under Section 90 of the Land Act, 2012.
14. From the foregoing, it would deduced that the parties were at all times in communication with regards to the facility of 24th September 2014. Any queries that the Applicant may have had were appropriately responded to by the Respondent, and that any error in calculation of interest had been addressed sufficiently. It was therefore, imperative and encumbered upon the Applicant to diligently repay the loan facility. Nonetheless, it would seem that they failed in this contractual

endeavor and sought to bring up unsubstantiated issues with regards to erroneous loan computations and loss of business, which in any event, cannot be imputed upon the Respondent, but rather on its ineptitude and callousness.

15. As was in **Giella v Cassman Brown & Another (1963) EA 358 and Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125,** it is for the applicant to establish that they stand to suffer irreparable loss that may not be adequately compensated for in an award for damages. In this instance, the Applicant had resorted to making a claim as to the dispute in the rate of interest that was charged, which as was reiterated in **Argos Furnishers Ltd v Ecobank Kenya Limited & Another (2014) eKLR and Habib Bank AG Zurich v Pop in Kenya Ltd [1989] LLR 3069 (CAK) as reiterated by Nyamu, J (**as he then was)**in Labelle International Ltd & Another v Fidelity Commercial Bank & Another (2003)** 2 EA 541, was not sufficient cause to sustain an application for injunction orders. In **Argos Furnishers Ltd v Ecobank Kenya Ltd & Another (supra),** it was held *inter alia*;

> **"The subject on whether disputes on the sum owing and interest charged on a mortgage sum could be a basis for the issuance of an injunction is replete with ample judicial precedents as well as respected literary works. I am content to adopt a work of Rudd, J in Bharmalal Kanji Shah & Another v Shah DeparDevji (supra) that:**
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> **…the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage. "**

16. The Applicant has, in the instance, failed to establish a *prima facie* case with the probability of success against the Respondent. Further, it has not been able to establish that there are losses that it would incur that were of the magnitude that could not be settled in an award for damages. And lastly, the balance of convenience, going by the foregoing circumstances, would tilt and lie in favour of the Respondent. The upshot is that the application by the Plaintiff is unmeritorious, and the same is dismissed with costs awarded to the Respondent.

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

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C. KARIUKI

JUDGE

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

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O. SEWE

JUDGE