



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 39 OF 2016

ALLIED EAST AFRICA LIMITED1ST PLAINTIFF/1ST APPLICANT

MIDLAND ENERGY LIMITED2ND PLAINTIFF/2ND APPLICANT

VERSUS

FIRST COMMUNITY BANK LIMITEDDEFENDANT/RESPONDENT

RULING OF THE COURT

1. The Notice of Motion application before the court is dated 14th February, 2016 and filed herein on 15th February, 2016 by the plaintiffs. The application has a total of 15 prayers mainly being injunctive prayers seeking orders to secure the suit properties from sale, advertisement or disposal by the defendant or its agents. The application also seeks for an order to stop the defendant from referring the plaintiffs to any Credit Deference Bureau. Lastly, the application seeks an order of this court to compel the parties to negotiate and to reach a settlement on outstanding amounts due to the defendant.

2. The application is premised on the grounds set out therein and is supported by affidavit of **ALI NOOR ABDI** sworn on 14th February, 2016 and a Further Affidavit sworn on 13th April, 2016.

3. In brief, the plaintiffs/ applicants case is that they have various current financial facilities with the Defendant/Respondent of which three are the subject of this application, to wit, Kshs. 11,100,000.00 advanced to the 2nd Plaintiff/2nd Applicant and USD. 1,180,000.00 and Kshs. 18,000,000.00 advanced to the 1st Plaintiff/1st Applicant. The Applicants annexed copies of the respective Letters of Offer. The 2nd Plaintiff/Applicant allege that they have consistently and religiously and continues to consistently and religiously redeem its financial facility, and that the maturity date and the repayment schedule of the Letter of Credit facility advanced to the 1st Plaintiff/1st Applicant was clear to the Plaintiffs/Applicants that it would mature at the end of May, 2016 and the 1st Plaintiff/1st Applicant had made financial plans to commence repayments in June, 2016.

4. The Applicants' case is that the Defendant/Respondent, by itself, its agents, its employees, made various misrepresentations, orally, written or otherwise, regarding the maturity date and repayment schedule of the Letter of Credit financial facility advanced to the 1st Plaintiff/1st Applicants which representations the Plaintiffs/Applicants relied on in making their financial plans. However the Respondent, has threatened and continues to threaten the plaintiff/Applicants to list the Plaintiffs'/Applicants with the Credit Reference Bureaus on 18th February, 2016 if the Plaintiffs/Applicants do not pay the full sum of Kenya Shillings Kshs. 118,000,000.00 on or before 18th

February, 2016, under the threat that in default they would enforce the securities given by the Plaintiffs/Applicants on account of the financial facilities advanced by the Defendant/Respondent.

5. Notwithstanding the uncertainty as to the maturity date of the Letter of Credit facility, the misrepresentations by the Defendant/Respondent, by itself, or its agents and premised on the nature of the business of Plaintiffs/Applicants and the length of time, on average 7 (seven) months it takes to be paid by its debtors, the Plaintiffs/Applicants, in good faith, have approached the Defendant/Respondent to restructure the Letters of Credit facility to redeem it beginning 1st June, 2016, by twenty four (24) monthly installments, the facility to the 2nd Plaintiff/2nd Applicant be restructured to be paid in twenty four (24) monthly installments and the Kshs. 18,000,000.00 to the 2nd Plaintiff/2nd Applicant be restructured to be paid in two installments of Kshs. 10,000,000.00 and Kshs. 8,000,000.00 but the Defendant/Respondent has declined, refused, failed and/or neglected to respond and is hell bent on selling the Plaintiffs'/Applicants' assets and/or spoiling the reputation of the Plaintiffs/Applicants by referring their respective credit information to the Credit Reference Bureaus on 18th February, 2016 the ripple effect being to create a financial crisis in the general business of the Plaintiffs/Applicants. In light of the foregoing, it is the Plaintiffs' case that the commissions and/or omissions by the Defendant/Respondent are procured in bad faith and they are an attempt to cause crisis in the operations of the Plaintiffs/Applicants, who are now apprehensive that the actions and/or omissions by the Defendant/Respondent will cause irreparable damages to the Plaintiffs'/Applicants' business and good will that cannot be compensated by damages.

6. The plaintiffs' further case is that the defendant has not stated the exact dates when the various facilities to the plaintiffs would mature and hence the date on which the plaintiffs would be obligated to start repaying the facilities. The plaintiffs do however admit that they are indebted to the defendant but there is a dispute as to the securities created, when the securities mature and the manner in which the payment should be made. So, to protect their equitable right of redemption and hence their businesses the plaintiffs have sought refuge in this court.

7. The application is opposed by the defendant vide a Replying Affidavit sworn by George Obiko dated 8th March, 2016. The defendant/Respondent's case is that as conceded by the plaintiffs/applicants, they applied for and were granted various credit facilities by the defendant advanced to finance their working capital requirements together with other financial requirements as arose from time to time in the course of their business. These included Equity/working capital financing line agreement (investment musharaka) to Allied (E.A) Ltd (1st plaintiff), in the sum of USD 1,000,000.00; Equity/working capital financing line agreement (investment musharaka) to Midland Energy Ltd (2nd plaintiff), in the sum of Ksh. 17,000,000.00, and Letter of credit to Allied (E.A) Limited in the sum of Kshs. USD 180,000.00.

8. The Respondent's case is that it was a term of the advance that the plaintiffs would settle the principal amount together with the agreed profit accrued in favour of the defendant at the time and in the manner agreed as set out in the said letters of offer together with the securitization documents. It was a term of the loan agreement that the credit facilities extended to the plaintiffs/applicants would be secured by;

- i. ***A legal charge over the property L.R NO. 209/18870/78, Nairobi***
- ii. ***All assets debenture of USD 1,180,000 against Midlands Energy Limited.***
- iii. ***Corporate guaranteed by Midland Energy Limited.***
- iv. ***Irrevocable Notice of assignment of all current and future receivables under the finance agreement.***
- v. ***Joint and several deeds of guarantee duly executed by the directors of Allied (E.A). Limited.***
- vi. ***Joint registration of motor vehicles KBG 760G, KBB 155F and ZC 9290.***
- vii. ***All assets debenture over the assets of Midlands Energy Limited.***
- viii. ***Joint and several deeds of guarantee duly executed by the directors of Midland Energy Limited.***

9. The Respondent's case is that the plaintiffs' directors executed all the securitization documents which were required for the perfection of the above listed securities and the same were registered as appropriate including the joint registration of the subject motor vehicles. The Respondent annexed marked "GO2"

being copies of the various security documents issued.

10. The Respondent's case is that in breach of their obligations to the respondent, the plaintiffs/applicants defaulted in their repayment of the various credit facilities as aforesaid and are presently in arrears thereof in the sum of facilities as aforesaid and are presently in arrear hereof in the sum of Kshs. 12,679, 842.30 as at 3rd February, 2016 with regard to Midland Energy Ltd and USD 180,000.00 together with Kshs. 93,780,944.66 as against Allied (E.A) Limited. As a consequence of the default, the defendant formally demanded for the payment of the outstanding amounts but despite the said demand, the plaintiffs failed, refused and/or neglected to pay up on their obligations to the bank. Arising from the failure to repay the said loans the 1st respondent instructed the 2nd respondent to proceed and recover by way of repossession, the motor vehicles that had been availed by the plaintiff as security and dispose the same by way of sale in recovery of the debt herein.

11. It is the Defendant/Respondent's case that the plaintiffs have on various occasions conceded their default and indebtedness to the bank and have already made various proposals on how to settle the outstanding amounts but the defendant is not under any obligation to accept the said proposals and they cannot be basis for the grant of an injunction against the exercise of rights that have accrued in law in favour of the bank. To this extent, the defendant verily believes that the present application has no basis in law and the same should be dismissed. The defendant's position is that the application is not merited as the default has been admitted, and if the orders prayed for are granted the defendant is likely to suffer serious loss and damages. The defendant submitted that the plaintiffs/applicants has not established a prima facie case to warrant injunctive orders sought herein.

12. With the leave of court parties filed submissions to the application. I have considered the application together with those submissions. I raise the following issues for determination.

- i. *Whether the plaintiffs are in default and whether the debt is admitted.*
- ii. *Whether there is a prima facie case for the temporary injunction.*

13. To address the first issue, there is no doubt that the plaintiffs are in default. They have admitted as such, and this court cannot purport to go behind that admission. The plaintiffs then try to mitigate this admission by stating that they do not know when the facilities shall mature, when they are to be paid and by how much. I find this ignorance by the plaintiffs quite difficult to comprehend. The facilities we are referring to here are not small facilities. They are as follows:

- i. USD 1,000,000
- ii. Kshs. 17,000,000
- iii. USD 180,000

The plaintiffs cannot convince this court that they purported to enter into those financial engagements without knowing when the same shall mature, or how much shall be repaid at what intervals. Else, how did the plaintiffs know that they are in arrears and sought to negotiate the matter with the defendant?

14. I have looked at annexures **GO1** (*Letters of Offer*) and **GO2** (*Charge*) by the defendant. These documents are properly witnessed and executed, and for the charge, registered and a certificate of registration issued dated 16th April, 2015. Those documents also contain the terms of engagement. It is not the province of this court to rewrite contractual documents for the parties. The plaintiffs having signed and executed those documents must surely know what the documents say. They cannot purport to leave the matter to the court.

15. I have also looked at the letters written by the plaintiffs to the defendant seeking for leave to repay the loans by installments. These letters are found in the unpagged Bundle filed by the plaintiffs. The first letter is undated. It is written by the 2nd plaintiff asking to be allowed to liquidate the debt by six monthly installments from January, 2016. The 2nd letter is dated 31st December, 2015 by the 1st plaintiff addressed to the defendant. It also seeks to be allowed to repay the loan in 24 monthly installment starting

from January, 2016. The last letter is dated 8th February, 2016 by the 2nd plaintiff addressed to the defendant seeking to be allowed to pay Shs. 18,000,000= in two installments of Shs. 10,000,000= in March, 2016 and Shs. 8,000,000= in April, 2016. It is clear that those requests were rejected by the defendant. However, there was nothing stopping the plaintiffs from making those payments. If they did, the request contained in the letter of 8th February, 2016 would be already complied with and the debt fully repaid, while the requests contained in the other two letters would be underway towards the 24th month deadline. That there is no evidence of such payments means that the plaintiffs' were not all along genuine in their proposals. So, it is the finding of this court, in answer to issue number one, that the plaintiffs are in default, and that the plaintiffs have admitted the debt owed to the defendant.

16. Having answered the first issue in affirmative, it is not now relevant to determine the second issue, that it, whether the plaintiffs have established a prima facie case. This is so because a party who admits owing the other a debt cannot in the same breath seek to stop the person owed the debt from taking lawful steps to realize the security. That simply means that the plaintiffs have failed to establish a prima facie case in the breath of **Giella vs. Casman Brown**.

17. For all the foregoing reasons, the inescapable verdict is that the plaintiffs' application herein dated 14th February, 2016 and filed the following day must fail and is herewith dismissed with costs to the defendant.

Orders accordingly.

E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JULY, 2016

LADY JUSTICE G. NZIOKA

JUDGE

Present