



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURT

Civil Suit 526 of 2011

RUPA COTTON MILLS (EPZ) LTD.1ST PLAINTIFF

PRABODH K. SHAH..... 2ND PLAINTIFF

ASMITA SHAH..... 3RD PLAINTIFF

VERSUS

BANK OF BARODA (KENYA) LIMITED.....DEFENDANT

RULING

1. The plaintiffs' application dated 15th March, 2012 seeks the following orders:

“1.

2. **THAT the Defendant by itself, its agents and/or servants be**

restrained from retaining and/or publishing with the CREDIT REFERENCE BUREAU or in any manner whatsoever. The Plaintiffs as a bad, doubtful or impecunious debtor pending the hearing and determination of this application.

3. **THAT the Defendant by itself, its agents and/or servants be restrained from retaining and/or publishing with the CREDIT REFERENCE BUREAU or in any manner whatsoever. The Plaintiffs as a bad, doubtful or impecunious debtor pending the hearing and determination of this suit.**

4. **THAT the costs of this application be provided for.”**

2. The application was brought under **Order 40 Rules 1 and 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act, Cap 21** of the **Laws of Kenya**.

3. The application was supported by an affidavit sworn by **Prabodh K. Shah** the 1st plaintiff's Managing Director.

4. The 1st plaintiff avers that, on 13th January, 2010 it applied for a temporary credit facility from the

defendant Bank of Kshs.3.7 Million. On 25th January, 2010 it applied for a further credit facility of Kshs.4,151,850/=.

5. On 18th March, 2010, the 1st plaintiff company accepted a credit facility offered by the defendant on the following terms:

(a) **letter of credit facility U.S. Dollars 0.750 Million and,**

(b) **letter of credit discounting U.S. Dollars 0.650 Million.**

6. That the facilities were and remain unsecured due to circumstances beyond the control of the 1st plaintiff. Further, the offer was contrary to the pre-shipment financing applied for by the 1st plaintiff and was only accepted to ensure the operations did not cease. The plaintiff requested for increased financing from US Dollars 0.750 million to US Dollars 1.35 million but the request was declined by the defendant. The failure to fully finance operations detrimentally affected business and the plaintiff was not able to operate at optional capacity, it was alleged. As a result, the plaintiff claimed, it incurred losses of Kshs.445,938,643.51 which is the subject of Nairobi HCCC No. 526 of 2011.

7. The 1st plaintiff further alleges that the defendant wrongfully and untruthfully reported to the Credit Reference Bureau (CRB) that the plaintiffs were a bad debtor, and the CRB has without verification of the veracity of the defendant's allegations and in disregard of written notice that the dispute between the plaintiffs and the defendant is the subject of H.C.C.C. No. 526 of 2011 and the rule of sub-judice caused the plaintiffs to be published in its reference as a bad debtor, whose effect is to diminish the creditworthiness of the plaintiffs to other finance institutions and stakeholders.

8. In a replying affidavit sworn by **SUNIL SHRIVASTAVA**, the Branch Manager of the defendant's Industrial Area Branch, the defendant avers that in a ruling dated 15th March 2012 delivered in **Winding up Cause No. 40 of 2011**, this Court held and found that the 1st plaintiff had admitted its indebtedness to the defendant. At page 9 of the ruling, the court stated that:

“In the present case, there is an admitted debt as discernible from the letter of restructuring dated 6th October 2011 hence there is a prima facie evidence of inability to pay the debt.”

9. In the same ruling, the Learned Judge exercised his discretion to stay advertisement of the winding up petition and any proceedings in that regard to allow the parties to explore an amicable settlement of the dispute. The court further ordered that in the event that the parties will have failed to reach a settlement on expiry of 60 days from the date of the ruling, the petitioner shall be at liberty to advertise the petition. The 60 days period granted by the Court for negotiations expired on 15th May, 2012.

10. No payment whatsoever has been made to the defendant to date. In view of the aforesaid ruling, the defendant stated, the 1st plaintiff is clearly a debtor and there was nothing wrongful or untruthful about reporting the 1st plaintiff as such to the Credit Reference Bureau.

11. The defendant further stated that the 1st plaintiff was listed in the Credit Reference Bureau on 31st October, 2011, even before filing of this suit and the injunction application sought herein and even before the filing of the winding up petition. For no apparent reason, the plaintiffs did not deem it necessary to raise the issue of the 1st plaintiff's listing with the Credit Reference Bureau earlier, either in this suit or in the winding up cause. The defendant therefore contended that the current application is an afterthought made in bad faith with the sole purpose of further frustrating recovery of the outstanding sum by the defendant.

12. By a letter dated October 10, 2011, the defendant notified the 1st plaintiff of its intention to have the 1st plaintiff listed in the Credit Reference Bureau and by a letter dated November 7th 2011, the defendant

notified the 1st plaintiff of its listing in the Credit Reference Bureau. The listing is in accordance with **The Banking (Credit Reference Bureau) Regulations, 2008, Part III Section 14(1) and Part IV Section 28 (4)** which make it mandatory for banks to share non-performing loans information to the Credit Reference Bureau, the defendant stated.

13. I have considered the submissions by all the parties as well as the pleadings on record.

14. I note that the 1st plaintiff was listed in the Credit Reference Bureau on 31st October, 2011. This application was filed on 20th March 2012, well after the listing therein. How can the court issue an order to restrain an act that has already been done?

15. **The Banking (Credit Reference Bureau) Regulations, 2008 Section 28 (4)** provides that:-

“Institutions shall be entirely responsible and under obligation to submit and update all customer information to the Bureau in accordance with these Regulations.”

Further, **Section 14 (1)** provides that:-

“Customer information which shall be exchanged pursuant to these Regulations is any customer information concerning a customer’s non-performing loans, and may include details specified in sub-regulation (2). “

16. The purpose of the Credit Reference Bureau is to help banks and all other credit providers decide whether a potential borrower will be able to repay a new loan.

17. The plaintiffs do not dispute that they are indebted to the defendant. However, they allege that the dispute is in relation to the amount owed.

18. The defendant on the other alleges the plaintiffs have not made any payment to date. Further, that they informed that plaintiffs of the listing to the credit in Reference Bureau in accordance to the Regulations as provided in **The Banking (Credit Reference Bureau) Regulations, 2008**.

19. The plaintiffs have brought this application seeking an injunction under **Order 40, Rules 1 and 2 of the Civil Procedure Rules, 2010** as against the defendant. But in my opinion they have not satisfied the principles as enunciated in the well known case of **GIELLA vs. CASSMAN BROWN [1973] E.A. 358**.

20. If a borrower has defaulted on a loan, it is mandatory that the bank shares this information with all other banks. The plaintiffs’ assertion they have been portrayed as bad, impecunious and doubtful debtors does not lie. The information that the defendant has provided falls within the ambit of the provisions of the **Banking (Credit Reference Bureau) Regulations, 2008** and more particularly as provided for in **Section 14 of the Regulations**.

21. Much as there may be a dispute as to the amount owed, the plaintiffs have not settled the loan advanced to them, neither have any efforts been made towards the same.

22. Accordingly, the plaintiffs’ application is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2012.

D. MUSINGA

JUDGE

In the presence of:

Irene – Court Clerk

Mr. Gathu for Mrs. Oyatta for the Respondent

No appearance for the Plaintiffs