REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE 745 OF 2008

BANDULA UDALAGAMA & 2 OTHERS …. PLAINTIFFS

VERSUS

ECOBANK KENYA LTD. ……..…… DEFENDANT

R U L I N G

This ruling is in respect of application dated 10.12.2008. The certificate of urgency was granted and interim orders in terms of prayer 3 thereof issued. This ruling concerns prayer 4 where the applicant is seeking interlocutory injunction restraining the defendant, the agents, servants, advocates and auctioneers or others from breaching lending contract between them and the third plaintiff, whether by way of sale or dispossession by plot No. L.R.7879/20 (original No.7879/13/1), whether by public auction or private treaty or appointment of receiver/manager or any of them whosoever otherwise pending the hearing and determination of this suit.

The application is based on the ground set out in the application namely, that the defendant had lending contract with third plaintiff which were further secured by personal guarantee by the 1st and 2nd plaintiff and that the defendant in breach of the aforesaid contract as amended vide revised credit facility declined and/or refused to grant the 3rd plaintiff certain credited facilities which they had contracted to extend to the said plaintiff, thereby greatly devastating the 3rd plaintiff's business and placing it on the brink of liquidity problems.

Despite the difficulties, the 3rd plaintiff diligently serviced the credit facilities accorded to it by the defendant and as at 1.12.2008 there was no breach or default. The plaintiffs also agreed that the 3rd plaintiff's credit facilities would be reviewed on 14.12.2008 after which review it was contemplated that repayment terms would be adjusted. Accordingly, it was not expected that the defendant would purport to demand payment before that date as that would be clearly premature.

Furthermore, on 1.12.2008 the defendant wrote a letter demanding payment of certain sums of money (which were not due) and threatening to institute recovery proceedings for the entire outstanding balance if the aforesaid balance of money is not paid by 5.12.2008. Furthermore, the 1st plaintiff has received

information that the defendant is planning to sell the said property by public auction or appoint a receiver or manager over the assets, business undertakings of the 3rd plaintiff.

The supporting affidavit is sworn by Badula Udalagama, who is described as director of the 3rd plaintiff. He swears that at all material times the plaintiff was and is the registered proprietor of all that piece of land known as L.R.7879/20 hereinafter referred to as "said property". The 3rd plaintiff's factory is located on the said property and all business operations of the 3rd plaintiff are carried on the same property.

He admits that by a debenture dated 23.4.2001, the plaintiff and Akiba Bank Ltd., (hereinafter called Akiba Bank) where the plaintiff pledged in favour of the bank all its undertakings, book debts, goodwill, assets among others as security for repayment of advances or other financial accommodation granted to it by Akiba Bank to an aggregate amount of USD 950,000.

The debenture is exhibited as "BU 1". A further debenture dated 6.12.2001 made between the plaintiff and the Akiba Bank was issued as security for repayment of advances or other financial accommodation granted to the plaintiff upto an aggregate amount of Kshs.56 million and USD1,450,000. The further debenture is also exhibited as "BU 2". Further a mortgage dated 5.2.2002 made between plaintiff and the Akiba Bank, the plaintiff charged in favour of Akiba Bank the said property as security for repayment of advances or other financial accommodations granted to the plaintiff by Akiba Bank to maximum amount of Kshs.56 million and USD2,400,000 the mortgage is also exhibited as "BU 3".

In addition personal and joint guarantees dated 23.4.2001 were made in favour of the Akiba Bank by 1st and 2nd plaintiffs and a third party jointly and severally under which they guaranteed punctual performance, a discharge by the principal debtor of all its liabilities and obligations under any of the security documents then existing with Akiba Bank and undertook to pay on demand all monies and discharge all liabilities due owing or incurred by the principal debtor to Akiba Bank. The guarantee is exhibited as "BU 4".

It is sworn that subsequently Akiba Bank changed its name to EABL Bank Ltd. (hereinafter called "EABS"). By 13.12.2007, the 3rd defendant was indebted to EABS to the tune of

(a) Kshs.466,883/40 cts. By way of overdraft facility.

(b) Kshs.11,422,633/28 cts as demand loan facility.

(c) USD 3,559,686/64 by way of letters of credit facility.

(d) Kshs.1.5 million in respect of guarantee facility.

By a contract signed by both parties on 13.12.2007 the EABS agreed to revise the 3rd plaintiff's credit facilities with:

(a) The overdraft facility was to continue with a revised limit of Kshs.115 million with a reduction in the limit by Kshs.3 million every month, commencing 1.1.2008.

(b) There is to be a new demand loan of Kshs.300 million.

(c) The existing letter of credit facility to continue with the revised aggregate limit of USD3.5 million and

(d) The guarantee existing as at that date to continue.

(e) Compliance with the revised facility was to be reviewed on 14.12.2008.

The revised facility constituted a contract between the 3rd plaintiff and the EABS whereby EABS agreed to finance the 3rd plaintiff's business operations in accordance with the terms of the revised facility. It is sworn that the 3rd plaintiff complied with all terms of the revised facility and also EABS also duly performed their obligations pursuant to revised facility aforesaid until June 2008.

In June 2008, 75% of EABS shares were purchased by Eco Bank Transnational incorporated (ETI) and also EABS changed its name to Eco Bank Kenya Ltd. who is the defendant and its management changed, declined to honour its allegations pursuant to the agreement for revision of 3rd plaintiff's credit facilities despite of there being no breach or default on the part of the 3rd plaintiff or any of its directors. The refusal by defendant to honour its contractual obligations to the agreement for revision of the 3rd plaintiff's credit facilities dated 13/12/2008 greatly affected the operations of the third plaintiff who nevertheless struggled and has been servicing all credit facilities.

Exhibited are documents marked "BU 6" evidencing newspaper advertisement of the change of name as well as documents confirming how the defendant frustrated the 3rd plaintiff's business, leading to heavy business losses.

I addition to the above, on 1.12.2008, the plaintiffs received a letter dated 24.11.2008 from the defendant requiring them;

(**a) To pay the sum of Kshs.33,272,757/88 alleged to be as outstanding on overdraft facility.**

(b) To pay the sum of USD236,653/21 outstanding in respect to the letters of credit facility

(c) To pay the sum of Kshs.2,986,039 allegedly outstanding with respect to demand loan and facility

It is sworn that the amount demanded in letter dated 24.11.2008 aforesaid are not lawfully due and therefore do not lawfully reflect the correct balance in the defendant's books of accounts as at 1.12.2008, when the said letter was received and it is alleged that the said letter was maliciously and unconscionably and fraudulently written. Thereafter the deponent states that he sought meeting with managing director of defendant to demonstrate that the demand was not due but the managing director or the defendant refused to meet him.

The plaintiffs therefore, fear that since the deadline of 5.12.2008 has since expired (at the date of filing this application) the defendant may proceed to take any action that may not only breach the contract between the 3rd plaintiff and the defendant which will destroy the 3rd plaintiff's business.

Let it be noted that in the plaint the plaintiffs are seeking permanent injunction and declaration and damages for loss of business and breach of contract.

The Bank has filed a statement of defence and grounds of opposition to the application. The grounds of opposition state that the plaintiffs do not demonstrate a prima facie case with a probability of success and do not state why damages cannot be adequate remedy. Also that a party cannot base its cause of action on contracts the party breached. And that the application is solely grounded on rumours and self induced fears and cannot be the basis of granting the equitable remedy of injunction and also that the plaintiffs have expressly admitted that they are in default of their financial obligation to the defendant. The grounds of opposition are supported by the submissions of Mr. Abdul Nassir who has submitted that the application does not need a replying affidavit and it should fall on its own. He submits that there is uncertainty as to which security document is breached. He further pointed out that no statutory notice of 90 days has been issued and he confirmed that there is no danger that the defendant wishes to auction the property and there is no eminent danger to be saved.

In addition Mr. Nassir submits that the 3rd plaintiff was indebted to the defendant and that a bank may at any time demand payment.

In reply the applicant's counsel submitted that there has been no default and that there was only contract between the plaintiffs and the defendant.

The applicant has cited authorities:

(1) Kivutiri vs. Kenya Shell Ltd. 1981 KLR 390 – where the High Court held that the conditions of granting an injunction are; existence of a prima facie case with a probability of success, likelihood of the applicant suffering irreparable harm cannot be compensated by damages and if in doubt the balance of convenience.

(2) Jambo Biscuits Kenya Ltd. vs. Barclays Bank of Kenya Ltd. (2003) 2 EA 434 – in this case the court (High Court) that the plaintiff had established a prima facie case with a probability of success that debenture was invalid because non endorsement of the advocate's name who should make the debenture invalid. In this case the plaintiffs are alleging that there is breach of the contract of lending by the defendant and they have demonstrated that the amount demanded was not due according to the security document. They have also alleged that the demand made by the defendant in the letter dated 24.11.2007 was maliciously written, particulars of malice and fraud are pleaded.

(3) Toicottu Union & another vs. Tanzania & Italian Petroleum Refining Co. Ltd (1999) 1 EA 347 – this is a decision of the Court of Appeal of Tanzania at Dares Salaam in which the court held that the trial judge was wrong in dealing with the issues in main suit at the time of hearing the application for temporary injunction and for dismissing application when there were serious questions to be tried between the parties. The judge should have granted the temporary as prayed to maintain the status quo pending the trial of those questions.

(4) Russel & Co. Ltd. vs. Commercial Bank of Africa Ltd. & another – this is a Court of Appeal decision in which the Court of Appeal stated the principles upon which such injunctions are granted. It was held from the fact of that case that it was a mis-direction for the judge to describe the suit premises as a commercial undertaking for which the plaintiff could be compensated in damages. However, the premises was a property of vital concern to the plaintiff and one of its managing directors as its purpose was to provide either revenue or shelter. Had the judge not mis-directed himself, he would have found that the case under the 3rd principle in Giella vs. Cassman Brown Co.Ltd. (1973) EA 358 that when a court is in doubt it will decide on an application on the balance of convenience.

It is true and it is admitted by counsel for the defendant that the statutory notice of 90 days has not been issued. However, there is the security by way of debenture which gives the defendant power to appoint a receiver at any time after the security prosecuted by the debenture has become enforceable whether or not the bank has entered into or taken possession of the whole or any part of the charge property pursuant to the debenture.

The letter of demand dated 24.11.2008 purporting to call the loans outstanding is contrary to the terms of loan agreement as devised and if enforced the 3rd plaintiff would suffer irreparable loss as it appears, its business would come to a standstill affecting and rendering the plaintiff's employees numbering 2500, jobless. And the plaintiff would move to sell its assets through a receiver so appointed.

It is my view, that there is genuine threat to the plaintiffs' financial position if the orders were not granted. **Order XXXIX rule 2** allows the court to issue temporary injunction in cases of breach of contract. The contract of lending will continue in existence until the debenture-holder appoints a receiver or a statutory notice to realize the property charged is issued. At the moment, it is admitted that the two events have not occurred and at the time of filing this application, there was no default of terms of revised contract.

In the circumstances, I find that it is just to grant injunction as prayed to protect the interest of the plaintiffs pending the hearing of this suit. It is a case where damages would not be adequate to

compensate the plaintiffs if their business was brought to an end at this stage.

And I so hold. Application is allowed and orders granted as prayed in terms of prayer 4. Costs shall be in the cause.

DATED and **DELIVERED** at Nairobi this 5th day of May 2009.

JOYCE N. KHAMINWA

JUDGE