REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 3708 OF 1988

BETWEEN

STANLEY MUNGA GITHUNGURI................................ APPELLANT

AND

JIMBA CREDIT CORPORATION LTD........................RESPONDENT

RULING

October 25, 1988 **Mbaluto J** delivered the following Ruling.

On 26th April, 1983 the defendant, Jimba Credit Corporation Ltd., a financial institution licensed under the Banking Act cap 488 of the Laws of Kenya) lent to Mukawa (Hotels) Holdings Limited ("Mukawa") the sum of shillings Forty Million (Shs 40,000,000/=) to assist "Mukawa" in connection with its business known as "Lilian Towers Project". Repayment of the loan was secured by a charge over L.R. 209/2461 which is registered in the name of the plaintiff.

By a letter dated 31st August, 1988 addressed to the plaintiff by the defendant's advocates, the defendant served upon the plaintiff notice of its intention to exercise its statutory power of sale under the charge pursuant to the provisions of section 69A of the Indian Transfer of Property Act, by selling the charged property, on the ground that default had been made in th loan repayment. Included in the total sum demanded in the statutory notice were other moneys lent to the plaintiff by the defendant under two separate loans, one of which had been advanced to the plaintiff personally and the other to a company known as Tassia Coffee Estate owned by the plaintiff. The defendant combined all the three loans in the statutory notice, allegedly, on the basis of its right, under the charge, to consolidate all loans due to it from the plaintiff.

In response to the statutory notice, the plaintiff filed a suit against the defendant claiming that the charge was in contravention of section 10(1) of the Banking Act and therefore illegal and unenforceable. He therefore sought a declaration to that effect. In the alternative, the plaintiff averred that the defendant had refused to give an account of moneys that may have been advanced, despite the plaintiffs requests to do so, and sought an order that accounts be taken between him and the defendant. In connection with this prayer, the plaintiff alleged that the correct interest, if any, chargeable on the loan was 14% as agreed by the parties. He also pleaded that under the terms of an agreement arrived at between the parties subsequent to the charge he was not in default as he had continued to pay the moneys as agreed between the parties. This last averment no doubt flows from the alleged variation of the original terms of the charge a matter to which learned counsel for the plaintiff strongly canvassed during his submissions before me.

At the time of filing suit, the plaintiff also lodged an application, under Order XXXIX rules 1 and 2 of the Civil Procedure Rules and section 3 of the Civil Procedure Act for an order to restrain the defendant from exercising its statutory power of sale over the charged property until the dispute between the two parties is determined by this court. The application is supported by two affidavits sworn by the plaintiffs, the first one on 12th September, 1988 and the second on 26th September, 1988. Not to be outdone by the plaintiff in terms of the number of affidavits filed in connection with the application, the defendant also filed two separate affidavits in reply, both sworn by a Mr David Karanja Maina (the defendants Money and Banking Manager), the first one on 23rd September, 1988 and the 2nd on 26th September, 1988. This ruling is on that application.

The issues that are brought out by the pleadings of the two parties and which therefore call for determination before a decision on the plaintiff's application for a temporary injunction can be made are, in my view, as follows:

1. Whether the charge is, as alleged by the plaintiff, illegal and unenforceable.

2. Whether, if not defeated by illegality, the charge was varied as claimed by the plaintiff;

3. Whether, if the defendants is entitled to recover the loan advanced to "Mukawa" it is entitled to consolidate the Mukawa debt with the other two loans as it has attempted to do in the statutory notice to the plaintiff.

4. Whether the defendant has refused to render an account to the plaintiff.

The conditions for the grant of an interlocutory injunction were re-stated by the Court of Appeal for Eastern Africa in the well known case of *Giella v Cassman Brown & Co Ltd* (1973) E.A 358). They are, first that an applicant must show a prima facie case with a probability of success and secondly that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. The third condition is that if the court is in doubt it will decide the application on the balance of convenience.

The question to be decided in this application is whether the application has satisfactorily met the requirement of the conditions or tests set out in the Giella Case. I will first deal with issue number 3, and then issues numbers 2, 4 and 1 in that order.

The claim by the plaintiff that the defendant is not entitled to consolidate the loans secured by the charge is not contained in the plaint. It was first raised in the plaintiff's 2nd affidavit sworn on 26th September, 1988. In his submissions Mr Hira for the plaintiff argued that the demand in the statutory notice for the repayment of other moneys owing by the plaintiff to the defendant on other accounts in addition to the Mukawa loan was unlawful in that the defendant was not entitled to consolidate the plaintiffs undebtedness to it. This contention is however clearly unmeritorius because slause 7(f) of the charge expressly gives the defendant the right to "combine or consolidate all or any of the chargor's (plaintiff) accounts with and liabilities to the defendant and set off or transfer any sum or sums standing to the credit of any one or more of such accounts in or toward satisfaction of any of the plaintiffs or Mukawa's liabilities to the plaintiff on any other account or in any other respect whether such liabilities be actual or contigent primary or collateral joint or several." There was therefore nothing wrong in the defendant demanding the repayment of all the loans due and owing by the plaintiff to the defendant ...

As regards the claim that the terms of the agreement between the two parties were varied the variation is according to Mr Hira supposes to have been agreed in two letters between the parties. The first letter, dated 11th February, 1987 is by the plaintiff to the defendant. It reads:

"Jimba Credit Corporation Ltd.,

P. O. Box 43704,

NAIROBI

Attention; Mr E.K Mathiu

Dear Sir,

Re: LOAN FACILITIES FOR:

(1) S.M GITHUNGURI

(2) TASSIA COFFEE ESTATE LTD

(3) MUKAWA (HOTELS) HOLDINGS LTD

I refer to the discussion with you of this morning when my indebtedness with you was discussed and agreement reached as follows:

1. (a) The indebtedness is agreed at Kshs 65,772,905/=

(b) I shall endeavour to the transfer the debt to a willing financier; in the meantime,

(c) Interest shall be payable on the said sum of Kshs 65,772,905/= at a rate of 14% per annum from 1st January, 1987 up to 31st December 1988 and thereafter 16% p.a.

(d) I am hopeful that my effort to transfer the debt elsewhere shall be successful but, in the unlikely event that I will be unsuccessful, I offer to repay the indebtedness as follows:

For the first two years, (1987 and 1988) unfortunately only interest will be paid as the project cannot accommodate repayment of the principal amount. However, the principal amount will be repaid over 5 yearly instalments of Shs 5 million, 6 million, 12 million, 19 million, 24 million, the first such instalment failing due in 1989 respectively.

Interest will be paid on monthly basis at a rate agreed in accordance with a schedule to be submitted to you in near future. As for the interest already in arrears for the period ended 31st December, 1986 this will be cleared by Ksh 1 Million on or before 27th February, 1987 and, the balance before the end of next month.

Kindly let me have your confirmation on above.

Yours faithfully,

The second letter is the defendant’s reply to the plaintiff.

It is as follows:

“Mukawa Holdings Ltd.,

P O Box 49194,

NAIROBI

ATTENTION: Mr S M Githunguri:

Dear sir,

Re: Loan Facilities for:

S M Githunguri

Tassia Coffee Estate Ltd.,

Mukawa (Hotels) Holdings Ltd.

This is to acknowledge your letter of February 11, 1987 regarding the outstanding indebtedness and confirm the following:

(a) That the indebtedness for all the three accounts has been agreed at Kshs 65,772,905/= as of August 30, 1986.

(b) That interest at a rate of 14% per annum will be paid on monthly basis in accordance with a schedule that you will submit in due course.

(c) That interest already in arrears for the period ended

December, 31 1986 be cleared by Kshs 1 million on or before 27th February, 1987, and the balance to be cleared on or before 31st March, 1987.

(d) That the principal amount to be paid as per the schedule by yourselves.

Please be guided accordingly.

Yours faithfully,

For JIMBA CREDIT CORP LTD

(signed)

F K Ngatia

GENERAL MANAGER

A careful examination of the two letters reveals that no agreement was reached by the parties on the matters raised in them. In his letter the plaintiff states that the debt is agreed at shs 65,772,905/= without specifying as at what date the figure had been calculated but suggesting by implication that it was as it the time of writing the letter i.e 11.2.87. On the other hand, the defendant in its letter of 23rd February, 1987 says that the sum of shs 65,772,905/= was due as at 30th August, 1986; so clearly there is no agreement as to the amount outstanding. Similarly with regard to interest chargeable, the plaintiff in his letter states that it should be 14% per annum from 1st January, 1987 up to 31st December, 1987 and thereafter at 16% per annum while the defendant states that interest will be at he rate of 14% per annum to be paid on monthly basis in accordance with a schedule to be provided by the plaintiff. Since no schedule was provided it is again clear that no agreement was reached regarding the rate of interest payable or how it was to be repaid. Accordingly the claim by the plaintiff regarding the alleged variation and more specifically an agreement to charge different rates of interest is not supported by any evidence. And in any event the law is that a registered document cannot be varied by an unregistered document (see *Mullas Commentary on Indian Registration Act* page 49 and section 32 of the Registration of Titles Act; see also Theodore B. F. Ruoff – *Land Registration Practice* – 1st Edition page 121.)

The other issue I have to consider before I come to what I think is the real bone of contention between the parties in this matter is the allegation by the plaintiff of the defendant's failure to render an account despite requests by the plaintiff to do so. There was no evidence to show that the plaintiff made such a request and in fact Mr Hira for the plaintiff did not even canvass this issue during his submissions. It was in my view an afterthought. In the case of *Bharmal Kanji Shah and Another v Shas Depar* (1965) EA 91 it was held that the Court should not grant an injunction restraining a mortgage from exercising his

statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage. Accordingly even if I were of the view that the plaintiff had established that the defendant had refused to render an account, which position I think has not even been established, I would still not grant an injunction in this matter solely on that ground.

I now turn to consider the main issue that has to be dealt with in this atter i.e. the claim that the contract or rather the charge is illegal and

unenforceable.

Section 10(1) of the Banking Act (Cap 488) provides as follows:

> "10. (1) A licensed bank or licensed financial institution shall not in Kenya-
>
>> (a) grant to any person any advance or credit facility or give any financial guarantee or incur any other liability on behalf or any person, so that the total value of the advances, credit facilities, financial guarantees and other liabilities in respect of that person at any time exceed five per cent of the total deposit liabilities of that bank or financial institution or more than one hundred per cent of its paid up capital or assigned capital and unimpaired reserves, whichever is the greater;"

It is common ground that the defendant (a licensed financial institution), in advancing to Mukawa the sum of shs 40,000,000/= which said sum exceeded 5% of the total deposit liabilities and more than 100% its paid up capital, was acting in contravention of the above section. The penalty for contravention of the section is a fine not exceeding Ksh 20,000/= for the institution and a fine of Ksh 5,000/= or six months imprisonment for any officer of the bank who cannot prove that he was not aware of the contravention. The Act is however silent on the civil rights of the parties where the section has been contravened. In their respective submissions before me, learned counsel for both parties cited several authorities all which I have carefully considered. The position in law would appear to be as follows:

> "where the statute is silent as to the civil rights of the parties but penalises the making or performance of the contracts the courts consider whether the Act, on its true construction, is intended to avoid contracts of the class to which the particular contract belongs or whether it merely prohibits the doing of some particular act ... it is important to note that where a contract on its performance is implicated with breach of a statute, this does not entail that a contract be avoided. Where the Act does not expressly deprive the plaintiff of his civil remedies under the contract the appropriate question to ask is whether; having regard to the Act and the evils against which it was intended to guard and the circumstances in which the contract was made and to be performed, it would in fact be against public policy to enforce it. (see *Chity on Contracts* 25*th* Edition Vol 1 page. Also "where a statute imposes a penalty on one or both of the parties to a contract as a result of their entering into the contract or of their manner of performing it, the court will consider whether on the construction and purpose of the statue the doing of the particular act is forbidden as illegal or whether there is merely a charge imposed upon it. If the letter, it is clear that the contract itself is a not prohibited." (see *Chitty* supra)

The Banking Act was enacted to "regulate the business of banking and for matters incidental thereto and matters connected thereto" The subheading of Part III of the Act under which section 10 (1) falls is headed "Prohibited Business". Does is this prohibition make the charge illegal and unenforceable?

There are four main ways in which the enforceably of a contract may be effected by a statutory provision which renders particular conduct unlawful.

(1) The contract may be to do something which the statute prohibits;

(2) The contract may be one which the statute expressly or impliedly prohibits;

(3) The contract although lawful on its face, may be made in order to effect a purpose which the state renders unlawful; or

(4) The contract, although lawful accordingly to its own terms, may be performed in a manner which the statute prohibits.

(see the case of *Yango Pastoral Company Ltd and others v First Chicago Australia Limited* (1978) 139 CLR 410) In my view, the present case falls under category (b) above i.e a contract which the statutes expressly or impliedly prohibits. In discussion this category of contracts in the Australian case cited above (a case, incidentally, which I found quite useful in considering this application as the facts therein were almost similar to those of the present case) Gibbs A.C.J. had this to say:

> It is often said that a contract expressly or impliedly prohibited by the statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute it terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance for a contract, it is a question of construction whether the statue intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.
>
> The question whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes. “The determining factor is the true effect and meaning of the statute” (*St John Shipping Corporation v Joseph Rank Ltd* (1957) IQ.B. 267) “One must have regard to the language used and to the scope and purpose of the statute” (*Archbolds (Freightage) Ltd v S Spanglet Ltd* (1961) 1 QB 374 consideration that has been regarded as important in a great many cases, is whether the object of the statute – or one of its objects – is the protection of the public. An antithesis is commonly suggested between an intention to protect the public and an intention simply to secure revenue, and it is said that when the former intention appears the contract must be taken to be prohibited, whereas if the intention is only to protect the revenue the statute will not be construed as imposing a prohibition on contracts.
>
> The question whether the statute was passed for the protection of the public is one test of whether it was intended to vitiate a contract made in breach of its provisions, but I am with respect in full agreement with the views expressed in *St John Shipping Corporation v Joseph Rank Ltd* and *Show v Groon* (1970) 2 QB 504 that it is not the only test. It would be contrary to reason and principle to allow one circumstance to override all other considerations in the interpretation of a statute.
>
> As Devlin J said *St John shipping Corporation v Joseph Rank Ltd*. “The fundamental question is whether the statue means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important is conclusive.” (see also *Shaw v Groom*).

It is clear from its wording and particularly section 10 thereof that the object of the Banking Act was the protection of the public. Indeed both learned counsel for the plaintiff and the defendant agree that the object of the Act is the protection of the public. However, having agreed on the broad object and purpose of the Act, both parties see its application from two totally different angles. As submitted by his learned counsel the plaintiff understands the Act and particularly the penal section thereof as having been enacted for the purpose of arresting the “failure of several banks/or finance institutions for the protection of the public.” He submits further “section 10 is intended to protect the public whose money banks and financial institution like the defendant handle and receive in the form of deposits. Section 10 is intended to ensure that the public money shall not be lost or disappear by or under mismanagement by contravening the

provision of section 10. That is the "real intention of the legislature" He does not however extend the intended protection to include depositors money and would therefore be happy, solely on account of the contravention of the section by the defendant, to retain the moneys he obtained from the defendant.

On the other hand, the defendant claims that the purpose and object of the Act is to regulate the banking industry in this country and to protect the public and banking or financial institution in the ever complex world of commerce. Mr Kigano for the defendant submitted that the penalty imposed by section 28 of the Act was adequate and to declare the contract illegal and unenforceable would in effect amount to double jeopardy. On the authority of *St John Shipping Corporation vs Joseph Rank Ltd***,** Mr. Kigano further submitted that non enforcement of the contract may result in the forfeiture of a sum which "will not go into the public purse but into the pocket of someone who is lucky enough to pick up the windfall or astute enough to have contrived to get it."

The Banking Act does not state that money lent pursuant to a contract in contravention of section 10 (1) shall not be recoverable. The penal section of the Act merely provides for a fine for the institution concerned together with a fine and or imprisonment for the officers concerned. The claim that such a contract is illegal and unenforceable is the plaintiff's interpretation of the Act. However having regard to the language of the Act and the principles of construction of statutes referred to above, I am fully satisfied that the plaintiffs interpretation of the Act does not conform to sound principles of construction of statutes. Both parties concede that the purpose and object of the Act is to protect depositors. But the plaintiff contends that the Act should be so construed as to mean that any financial institution that contravened the Act would forfeit their rights to recover loan advanced in contravention of the Act. Furthermore and plaintiff would like the Act to be so construed as to facilitate his keeping for good the proceeds of such a loan without repaying a cent. In other words the plaintiff would be quite happy to keep a cool Ksh 90,000,000/= or so of depositors money solely because an officer of the bank may have deliberately or inadvertedly contravened section 10 (1) of the Banking Act. Surely Parliament could not have intended such an eventually. To do so would be to prejudice depositors and not to protect them. It is not rational to suppose that Parliament intended to inflict such dire consequences on innocent depositors. If Parliament intended to deny financial institutions the right to recover loans advanced in contravention of the Act, surely it would easily having so provided in the Act. In my view, the effect of contravening section 10(1) of the Banking Act is to subject the institution concerned to a penalty as provided in section 28 of the said Act and no more contravention does not vitiate or avoid the contract. Consequently in my view the charge created over the plaintiff's land was neither illegal nor unenforceable. It was a valid and enforceable contract by which both parties were bound.

For the above reasons the plaintiff has not shown to my satisfaction a prima facie case with a probability of success and in these circumstances I do not have to consider the other two conditions set out in the *Giella case*. Clearly the plaintiff is not entitled to an injunction in the circumstances of this case and his application must be dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 25th day of October, 1988

MBALUTO

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR