**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 251 OF 2018**

**NAKURU POLY SACK INDUSTRIES LTD ……..…..……..… PLAINTIFF**

**VERSUS**

**CHASE BANK LIMITED ……..…….. DEFENDANT**

**RULING**

1. The plaintiff commenced proceedings herein through plaint filed on 11th July 2018. It averred therein that it obtained a loan facility of a total of KShs 86,990,000 from the defendant in December 2015 out of which KShs 10,790,000 was for asset finance, KShs 12,000,000 for working capital and KShs 61,200,000 was a term loan. The facility was secured by a charge over LR No. 11262. That in breach of the loan agreement, the defendant failed to release to the plaintiff the sum of KShs 12,000,000 for working capital and KShs 10,790,000 for asset finance. That despite the breach, the defendant has issued to the plaintiff a 40 days' notice to reclaim the property by paying KShs 96,130,161 which is inclusive of the undisbursed loan.

2. Accordingly, the plaintiff sought judgment against the defendant for:

> ***a) A declaration that the defendant is in breach of the loan agreement and hence the right to recover the partial loan is unavailable till it complies with the loan agreement.***
>
> ***b) A temporary order of injunction is issued against the defendant by itself, its agents or servants restraining it from selling LR No. 11262 (Original number – 7502/1 and 7503/1). Until (sic) it complies with the loan agreement and or the Lands (sic) Act.***
>
> ***c) The accrual interest be stopped till the defendant disburse the balance of the loan (sic).***
>
> ***d) Costs of the suit***.

3. Alongside the plaint, the plaintiff filed Notice of Motion dated 10th July 2018 in which it sought an injunction to restrain the defendant by itself, its agents or servants from advertising or selling LR No. 11262 (Original number – 7502/1 and 7503/1) pending hearing and determination of this suit. The application is supported by an affidavit sworn by Mr Joseph Mbugua, the Managing Director of the plaintiff company.

4. The defendant responded to the suit by filing Notice of Preliminary Objection dated 23rd July 2018. The objection addresses the suit as well as the Notice of Motion and is stated to be on the following grounds:

> ***1. That the entire suit filed is bad in law and fatally defective as it offends the provisions of Section 56 (2) of the Kenya Deposit Insurance Act 2012.***
>
> ***2. That the suit and all proceedings taken against the defendant are therefore a nullity ab initio.***
>
> ***3. That the plaintiff/applicant's suit and application filed therewith are therefore incurably defective, bad in law and ought to be truck out***.

5. This ruling is in respect of both the application and the Notice of Preliminary Objection. Both were canvased by way of written submissions. Naturally, I will deal with the Preliminary Objection first.

6. The law on preliminary objections is settled. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** Law JA stated:

> ***So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration***.

7. The defendant's argument is that the defendant was placed under receivership and that this suit therefore offends the provisions of **Section 56 (2)** of the **Kenya Deposit Insurance Act 2012**. The section provides

> ***56. Stay of proceedings***
>
> ***(1) No cause of action which subsisted against the directors, management or the institution prior to liquidation shall be maintained against the liquidator.***
>
> ***(2) No injunction may be brought or any other action or civil proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the Court***.

8. From the onset, it must be noted that the plaintiff did not anywhere plead that the defendant is in liquidation or in receivership. It is the defendant itself which is introducing that angle. It is trite that a preliminary objection cannot be founded on facts which require proof. The issue of receivership or liquidation in this case is one that needs evidence to the extent that the plaintiff has not pleaded it. Even assuming that we were to accept that the defendant can introduce it then rely on it to prop up the preliminary objection, which of course it cannot, I note that although the defendant referred to some Gazette Notice in the replying affidavit, no such document is annexed to the affidavit. The preliminary objection must thus fail. It is dismissed with costs to the plaintiff.

9. Now back to the application. The principles applicable while dealing with an application such as the present one are long settled. The applicant has to satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. It must establish a *prima facie* case with a probability of success. Even if it succeeds in doing so, an injunction will not to issue if damages can be an adequate compensation to it. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

10. The plaintiff contends that in breach of the loan agreement, the defendant failed to release to the plaintiff the sum of KShs 12,000,000 for working capital and KShs 10,790,000 for asset finance and that despite such breach, the defendant has issued to the plaintiff a 40 days' notice to reclaim the property by paying KShs 96,130,161 which is inclusive of the undisbursed loan. The plaintiff however admits that the defendant disbursed to it a sum of KShs 61,200,000 which was designated as was a term loan. The defendant has countered that the plaintiff failed to service the loan as agreed and that as at 18th January 2017 the outstanding balance due from the defendant was KShs 83,139,890.10. I note that the plaintiff did not state anywhere in the supporting affidavit that it had made any repayments in respect of the amount it has acknowledged receiving. I further note that no affidavit was filed by the plaintiff to respond to the defendant's position regarding what was outstanding as at 18th January 2017. Even assuming that the defendant was in breach, the plaintiff must itself, as a litigant seeking equitable relief, demonstrate that it had done equity by making repayments in respect of what it has received. It has failed to do so. That kind of conduct disentitles it of an injunction.

11. As was stated by Kwach JA in **Mrao Ltd v First American Bank of Kenya Ltd& 2 others[2003] eKLR**:

> ***I listened to the submissions of Mr Wasuna, for the appellant, and he seemed to place a great deal of emphasis on the allegation that the securities were invalid for one reason or another. And that because of that, his client is under no obligation to repay the debt. At no point in the course of argument did Mr Wasuna indicate to the Court when this alleged invalidity first came to the knowledge of the appellant. The appellant took a large amount of money on the strength of these securities. It has not paid back even a single cent. When First American asked for payment the appellant rushed to a court of equity and in effect told the judge, it is true I took the money, I have not paid it back but First American is precluded from realising its security because both the charge and debenture are invalid. And for good measure the appellant adds that if First American is minded to recover the debt it can file a suit in the normal way for recovery as money had and received.***
>
> ***This kind of attitude, prima facie, shows that when the appellant took the money on the strength of those securities it had no intention of repaying it under the terms agreed with First American. This was a clear case of default, and as the appellant admitted this, there was no basis, on the authorities, upon which the appellant could obtain an order of injunction against First American. ..***

12. In any case, the current dispute boils down to a dispute on amounts due under the charge. That has never been a valid ground for granting an injunction to stop the exercise of statutory power of sale.

13. All in all, I am not persuaded that the plaintiff has established a prima facie case. In the circumstances, Notice of Motion dated 10th July 2018 is dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nakuru this 19th day of June 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Kimatta for the plaintiff/ applicant

No appearance for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi