REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 220 OF 2015

TROPICANA HOTELS LIMITED.....PLAINTIFF

VERSUS

SBM BANK KENYA LIMITED FORMERLY KNOWN

AS FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

JUDGMENT

1. By a Further Amended Plaint amended and filed herein on 7th February 2017, Tropicana Hotels Limited(the Plaintiff) prays for the following:-

a) A declaration that the Defendant charged excessive and illegal interest over and above contractual rates;

b) A declaration that the Defendant ought not to have threatened to report the Plaintiff to the Credit Reference Bureau before the illegal interest and other charges on the Plaintiff's accounts are reversed;

c) A declaration that any report to any unilateral report(sic) by the Defendant to any Credit Reference Bureau when there exists a dispute on the amount due is unconstitutional, unconscionable, oppressive, illegal and unreasonable to the extent that existing legislation does not require any Credit Reference Bureau to verify such information from the borrower thereby opening that procedure to abuse;

d) A declaration that a Charge by a Company is not enforceable until and unless it is registered with the Registrar of Companies and that the Charge is (un)enforceable as it was not executed in accordance with the law;

e) A declaration that the Charge to facilitate purchase of shares in the Plaintiff is a nullity;

f) A declaration that the Plaintiff did not receive the sum of Euros 1000,000/= secured by the Charge and therefore the Charge fails for want of consideration;

g) A permanent injunction restraining the Defendant from enforcing the security in any manner or form before it serves the statutory 90 days notice and other notices required by the Land Act, 2012 and (the) Land Registration Act, 2012;

h) A permanent injunction restraining the Defendant from reporting the Plaintiff to any Credit Reference Bureau until the amount due is determined by Court;

i) A declaration that the defendant interfered with or curtailed the Plaintiffs right to redeem and that therefore the defendant has no statutory power of sale;

j) An order directing the defendants to reverse all fraudulent, irregular, unlawful and illegal entries in the Plaintiffs statements together with interest and Penal Interest accruing on those entries and to deliver to the Plaintiff bank statements containing only valid entries;

k) General, punitive and aggravated damages of a sufficient amount against the defendant for those fraudulent and illegal entries; and

l) Costs of and incidental to this suit.

2. The said claims are premised on the Plaintiff's contention that it is the registered proprietor of land portion numbers 775 and 776 registered at the Coast Registry as CR Nos. 10407 and 10431 respectively at Malindi on which is built a hotel known as Sai Eden Roc (formerly Eden Roc Hotel). By a Charge dated 31st December 2010, the Plaintiff charged the suit premises to the Defendant for Euros 1,000,000/-. The Plaintiff contends that the said Charge was not executed by it as required in law and that the Plaintiff only saw a copy thereof after the commencement of this suit.

3. It is the Plaintiff's case that the said loan of Euros 1000,000/- is irrecoverable being a loan advanced by the Defendant to enable the current Plaintiff's directors and shareholders to purchase shares in the Plaintiff from the original shareholders contrary to the provisions of the Companies Act(now repealed).

4. The Plaintiff further avers at paragraph 5 of the Plaint that by a Further Charge in the year 2012, it further charged the suit premises to the Defendant for Kshs 50,000,00/-. The Plaintiff also obtained overdraft facilities from the Defendant. It is however the Plaintiff's position that it is not aware whether the Charge or Further Charge were registered as required with the Registrar of Companies and its directors have no recollection of having affixed the Plaintiff's Seal on the Further Charge.

5. The Plaintiff states that due to a down turn in tourism, it experienced financial difficulties. These difficulties were compounded when a major part of the hotel caught fire in December 2013 forcing them to close the hotel until December 2014. Despite being advised of the said difficulties, the Defendant recalled the facilities and demanded full payment. The parties thereafter disagreed on the interest and other charges imposed on the loans advanced and hence this suit.

6. By a Further Amended Statement of Defence dated and filed herein on 8th February 2017, Fidelity Commercial Bank Ltd (now known as SBM Bank of Kenya Ltd) (the Defendant) avers that indeed the suit premises stand charged in favour of the Defendant. Contrary to the Plaintiff's assertions, the Defendant avers that all documents due to be furnished to the Plaintiff were duly supplied. It is their case that the Charge is a public document which in any event could be obtained by the Plaintiff from the relevant land registry.

7. The Defendant further avers that the Charge and Further Charge were properly executed and sealed by the Defendant and that the same are enforceable in law. It is further their case that the sum of Euros 1,000,000/= was advanced to the Plaintiff for a lawful purpose and it is untenable for the Plaintiff to attempt to escape from its contractual obligations.

8. It is the Defendant's case that it legally and rightfully recalled the facilities advanced to the Plaintiff following the repeated and blatant default by the Plaintiff in meeting its repayment obligations. They contend that all Charges and other levies imposed by the Defendant on the Plaintiff's account have been valid and proper. It is their case that this suit is an unlawful attempt by the Plaintiff to frustrate the Defendant and its efforts to recover the substantial amounts owed to it by the Plaintiff.

9. At the trial herein the Plaintiff called two witnesses while the Defendant called one witness in support of their respective cases.

THE PLAINTIFF'S CASE

10. In his evidence in chief, PW1, Kamal Bhatt, told this Court that he is a director of the Plaintiff since 2010. He told the Court that it was not correct to say the Plaintiff borrowed Euros 1,000,000/- from the Defendant as stated in the Defence. From their Bank Statement, they did not receive any such credit. It was his testimony that the money went to the previous shareholders who were quitting the company as they came in.

11. PW1 further told the Court that he personally signed the Charge with his Co-director (PW2). At the said time, both the Plaintiff and the Defendant had a common Advocate Messrs Alkinson Cleasby & Satchu Advocates. When they arrived on the date they executed the Charge Mr. Satchu Advocate had already prepared the documents and he just pointed to PW1 and his co-director where to sign. After that Mr. Satchu asked him to send him their Company Seal. The same was delivered to Mr. Satchu's office by recorded delivery on 18th December 2010. The application for Credit Facilities from the Defendant for the term loan of Euros 1000, 000/- was in the name of his co-director Salim Sultan Moloo (PW2).

12. From a perusal of the account documents, PW1 stated that the sum of 500,000/= Euros was disbursed on 20th December 2010 and another such sum on 26th July 2011. Both were advanced to PW2 and not to Sai Eden Rock Hotel or the Plaintiff. By doing so, the Defendant was guaranteeing the previous shareholders Euros 500,000/- at the time at which the Hotel was being sold to them. At some point the Plaintiffs agreed with the Defendant Bank that the liabilities of PW2 be transferred to the Plaintiff so that it becomes the Plaintiff's debt.

13. PW1 testified that the Further Charge was created sometime in 2012. By virtue of the letter of offer, the Defendant gave the Plaintiff's a Bill Discounting Facility of Kshs 10,000,000/- as well as terminal loan of Kshs 10,000,000/-. In addition, they had an overdraft facility of Kshs 5,000,000/- This total sum was secured with a Charge for Kshs 50,000,000/-.

14. As a result of inflated and arbitrary interest, the debt shot up by Kshs 10,000,000/- as interest. According to PW1, the Defendants then sent the Plaintiff a demand letter for Kshs 72 Million instead of Kshs 64 Million which was due. At the said time, the Plaintiff had not been supplied with Bank Statements.

15. Upon cross-examination by Mr. Gikandi, for Learned Counsel for the Defendant, PW1 stated that he was aware when one signs a document, it has some significance. PW1 admitted that when they filed the case on 3rd December 2015, his co-directors Salim Sultan Moloo(PW2) swore an Affidavit in which he admitted that the Plaintiff owes the Defendant in both Kenya Shillings and in Euros.

16. PW1 stated that as far as he was concerned, they did not owe the Bank more than Kshs 50,000,000/-. However he stated that the Plaintiff Company did not owe the Bank anything in Euros and that it appeared his co-director had failed to distinguish between himself as an individual and the Plaintiff as a company.

17. Upon being referred to the Defendants Bundle of documents, PW1 agreed that there was a letter in which his co-director had asked the Defendant Bank to transfer the Euros 1000, 000/= from his account to that of Tropicana Hotels Ltd (the Plaintiff). This money had been advanced to the said co-director to purchase shares in the Plaintiff.

18. On his part, PW2, Salim Sultan Moloo also told the Court that he is a director and 50% shareholder of the Plaintiff. He testified that he had never signed a handwritten application for the loan. On being shown a Statement of Account on the Plaintiff in Euros, PW2 told the Court that he did not know how the Bank discharged the loan which had been advanced to him from his account as no fresh Charge was created for the Plaintiff.

19. According to PW2, as at 25th April 2015, he owed the Defendant Bank Euros 506,400/-. Thereafter, he made a loan repayment and left a nil balance. It was his case that there were two sets of Bank Statements concerning his Euros account but the same despite coming from the same Bank, the Defendant herein, did not tally.

20. PW2 told the Court that as at 5th November 2015, the amount outstanding from the Plaintiff was Kshs 64,869,592/- but the Bank instead demanded to be paid Kshs 71 Million. That was not the correct amount due, as the figure of Kshs 64,869,592/- had come from the Defendant's Malindi Branch. PW2 testified that they had only borrowed Kshs 25 Million –Kshs 10 Million of which was a loan, another 10 Million for what he described as Bill discounting and Kshs 5 Million for an overdraft facility. Thereafter, they created a Further Charge of Kshs 50 Million to secure the loan.

21. On Cross examination, PW2 admitted that he received Euros 1,000,000/- from the Defendant in 2010. He had however seen the Bank's Statements showing that he owed nothing and so he could not pay when the Bank was not demanding anything from him. He however conceded that the loan was taken over by the Plaintiff although the Plaintiff did not really benefit from it as it was used to purchase the shares of the hotel.

22. PW2 conceded further that the Plaintiff owed some money to the Defendant. He could not however tell the exact amount as the Statements supplied by the Defendant were incorrect. He told the Court that they had not been very regular in payment of the loan as they had spent almost Kshs 78 Million renovating the hotel when they took over. It was further his case that the Bank knew the hotel was destroyed by fire and there was therefore no reason to report them to the Credit Reference Bureau when they were doing their best to service the loan.

23. PW2 told the Court that even though the Further Charge Document indicated it had been signed and sealed in the presence of the Directors, he had only signed the document in the presence of Mr. Kinyua, his Advocate on record and it was not true that the seal was fixed in their presence.

24. PW2 told the Court that the Bank was Charging interest irregularly and thereby inflating the amounts outstanding. They had intended to instruct the Interest Rate Advisory Centre (IRAC) to compute the proper interest due but they discovered that IRAC's charges for such an exercise was too high. It was the Plaintiff's view that the only sum due to the Defendant was Kshs 64 Million.

THE DEFENCE CASE

25. The Defence called their Legal Officer as their Sole Witness-The Legal Officer James Oyuke (DW1) told the Court that the Plaintiff and the Defendant have had a relationship dating back to the year 2010. It was his testimony that from the Bank records, PW2 approached the Bank initially for a loan facility of 1 Million Euros. After the money was advanced, the said PW2 and his co-director wrote to the Bank confirming that the loan be taken over by the Plaintiff hotel.

26. The Bank agreed and transferred the facility to Tropicana Hotels. Thereafter the Plaintiff was granted Credit Facilities totaling Kshs 25 Million. As at 25th October 2016 the total amount outstanding on the Euros Account was Euros 1,203,726.26/-. For the Account in Kenya Shillings, the sum outstanding was Kshs 80,807,799.35/- as at 27th October 2016.

27. According to the Defendant, the loan was to be paid by 30th June 2011. Since they considered that this had become a non-performing loan, the Bank informed the Plaintiff that they would disclose the information to the Credit Reference Bureau. When the Plaintiff's learnt of the intention, they rushed to Court and filed this case. According to DW1, since then, the Plaintiff abandoned servicing the loan and the Defendant cannot include the loan in their list to the Credit Reference Bureau either.

28. Upon cross-examination by Mr. Kinyua, Learned Counsel for the Plaintiff, DW1 told the Court that he did not know the origin of the Statements which the Plaintiff claimed to have received from the Bank's Malindi Branch. It was however his case that after comparing those Statements with the Defendant's, the final figure which was demanded was the same. He told the Court that the Bank had initiated investigations into the source of the Plaintiff's documents.

29. DW1 conceded that the address to which the Statutory Letter of Demand was sent is P.O. Box 350-80200 Malindi and not the address shown in the Charge and Further Charge which was P.O. Box 83063-80100 Mombasa. He further conceded that the sum of Kshs 71,593,000/- cited in their demand letter was in excess by about Kshs 9 Million and that the correct figure due was about Kshs 64 Million.

ANALYSIS

30. I have considered the testimony adduced and the evidence placed before me by both the Plaintiff and the Defendant. I have equally considered in great detail the written submissions and authorities placed before me by the Learned Advocates for the parties.

31. It is the Plaintiff's case that by a Charge dated 31st December 2012, the Defendant agreed to advance Euros 1,000,000/- on the security of the suit premises herein. While the suit premises are indeed owned by the Plaintiff, the Plaintiff contends that the said amount of money was not advanced to the Plaintiff but to Salim Sultan Moloo a director of the Plaintiff and who testified herein as PW2 to enable him to purchase shares in the Plaintiff. It is the Plaintiff's case that the said Charge was invalid and unlawful as the lending to purchase shares was contrary to the provisions of Section 56 of the Companies Act (now repealed). The Plaintiff further submits that the said amount of money is therefore not recoverable from the Plaintiff as it was not advanced to it.

32. Mr. Kinyua, Learned Counsel for the Plaintiff submitted that under Section 3(3) (5) of the Law of Contract Act, a contract for the disposition of an interest in land must be in writing and must be executed in accordance with that statute. A Charge and Further Charge are contracts for the disposition of an interest in land and under that statute, a body corporate such as the Plaintiff herein can only validly executes a contract if its common seal is affixed in the presence of two directors in accordance with the Memorandum and Articles of Association.

33. It was the Plaintiff's Case that the Charge dated 31st December 2012 was signed by the Plaintiff's directors in the offices of Alkinson Cleasby & Satchu Advocates who were then the Advocates for both the Plaintiff and the Defendant herein. According to both PW1 and PW2, Mr. Satchu Advocate just showed them where to affix their signatures and did not explain the effect of Sections 69 and 91 of the Indian Transfer of Property Act, 1882(now repealed) to them. It was their case that thereafter the said Advocate asked them to send their Company Seal to him and the Advocate proceeded to affix the seal in their absence.

34. In addition, the Plaintiffs submitted that the Further Charge through which they acquired an additional facility of Kshs 50,000,00/- is also invalid as the same fails to reproduce Sections 90, 91, 93 and 94 of the Land Act.

35. From the material placed before me, it is evident that the Plaintiffs run a hotel in Malindi invariably referred to herein as Eden Roc Hotel Ltd and/or Sai Eden Roc Hotel. The said hotel is situated in Land Portion Nos. 775 and 776, Malindi,) (the suit premises). It is also apparent that PW2 used the money to acquire 50% shares of the Plaintiff which owns the said hotel. Later by a Further Charge dated 28th August 2012, the Plaintiff obtained a further Credit Facility of Kshs 50,000,000/- to enable them run the hotel. At some point however, the Eden Roc Hotel or a portion thereof was said to have been destroyed by fire and ceased operations for a while. This as well as a down-turn in tourism are cited by the Plaintiff as the main reasons for their inability to service the Credit Facilities advanced, either regularly or at all.

36. In their testimony before me both PW1 and PW2 who are the only two directors and shareholders of the Plaintiff, admitted that they signed the Charge documents before Mr. Satchu Advocate of Atkinson Cleasby & Satchu Advocates. While they contend that the Company Seal was not affixed to the document in their presence, I note that the two witnesses do not deny any of the contents of the Charge documents. A perusal of the document shows the following words inscribed therein before the signatures of the Plaintiff's directors:-

> ***"In the witness whereof the parties hereto have duly executed this Charge as of the day and that year hereinabove written."***
>
> ***The Common Seal of the Chargor was affixed in the presence of:-***
>
> ***Signed***
>
> ***Director"***

37. In my considered view the Plaintiff's two directors knew the document they were signing as well as the obvious implication that by signing the document at the portion mentioned above, they were confirming that the Common Seal of their Company had been affixed in their presence. The Plaintiff cannot therefore now turn around and deny that this Statement in the document they signed was incorrect.

38. As it were the rule has always been that where a contract has been reduced in writing, neither party can rely on extrinsic evidence of the terms alleged to have been agreed. As was stated in **Muthuri *–vs- National Industrial Credit Bank Ltd(2003)1KLR***:-

> ***"1 The history preceding the execution of a contract and any discussions or assurances in that regard are superseded by the subsequent written contract which becomes the exclusive memorial of the parties agreement.***
>
> ***2. No extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the document."***

39. In any event even if the Plaintiff's Seal was not affixed in the presence of its directors who signed the Charge document indicating it was affixed in their presence, the Plaintiff cannot in my view rely on its own mistake to now claim that the same is invalid after benefiting from the Credit Facilities extended as a result thereof. As it were, the Advocate who prepared the document was acting for both parties and if at all there were any omissions on his part, the same cannot be attributed to and/or used against the Defendant. As was stated in ***Lochab Transport Ltd –vs- Kenya Orient Insurance Ltd(1986)eKLR:-***

> ***"…neither party can rely on his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental and no matter that the other party knew that he was under a mistake."***

40. The same argument goes to the Plaintiff's claim that the tenor and purport of Section 69 of the Indian Transfer of Property Act (now repealed) was not explained to its directors. Again, a perusal of the Charge document reveals the following Statements from the directors:-

> ***" We Salim Sultan Moloo(PW2) and Kamal Bhatt(PW1) being the directors of the Chargor hereby acknowledge that we have had explained to us the fullest extent possible the impact and effect of Sections 90, 91, 93 and 94 of the Land Act which set out all the remedies available to the Charge and the full effect thereof."***

41. As it emerged during the trial herein, both PW1 and PW2 would choose what they could remember about the Credit Facilities extended to the Plaintiff when convenient and pretend not to recall whatever it is they deemed inconvenient. Thus while PW2 swore an Affidavit herein acknowledging that they owed the Defendant Bank various sums in Kenya Shillings and in Euros, PW1 feigned ignorance of the same and purported to accuse his co-director, PW2 ,of failing to distinguish between himself as a director and the Plaintiff as a Corporate person. Again having sworn in his affidavit filed herein on 3rd December 2015 that the Plaintiff owes the Defendant as aforesaid, PW2 turned around in his testimony and claimed it was PW1 who was the Finance person in the Company and that he PW2 was wrong in the sworn statement filed here in Court. However, when he was asked during cross-examination if he had paid back the money advanced to him in Euros, PW2 told this Court that he had not paid because the Bank was not demanding anything from him. Their tale, taken jointly and severally were so exaggerated and contradictory as could only be found in the legendary "Cock and Bull Stories."

42. From the material placed before me, the Plaintiff through its two directors wrote letters dated 21st June 2012 and 25th June 2012 requesting the Defendant to transfer the financial facility of Euros 1,000,000/- which was then due from PW2 to the Plaintiff. PW1 indeed confirmed during his testimony herein that they agreed with the Defendant that the liabilities of PW2 be transferred to the Plaintiff. By then PW2 had received the Euros 1,000,000/- and the Plaintiff can only be deemed to have received the same by virtue of their request and the subsequent transfer.

43. In this regard, I am in agreement with the submissions of Mr. Gikandi, Learned Counsel for the Defendant that the Plaintiff is estopped from running away from liabilities that it had gladly taken. In ***John Mburu –vs- Consolidated Bank of Kenya (2015) eKLR***, Justice Fred Ochieng discussing the aspect of Estoppel by conduct quoted the English decision of ***Moorgate Mercantile Company Ltd –vs- Twitchings (1976)1QB 225*** in which the Court observed as follows (at page 241).

> ***"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J put it in these words:***
>
> ***The principle upon which*** *estoppel in pais* ***is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he caused another party to adopt or accept for the purpose of their legal relations."***

44. Arising from the foregoing, it follows that the Plaintiff is estopped from alleging that it did not receive the money that was advanced to PW2 when it had in writing requested the liability to be transferred to it. Indeed the existence of this charge is the reason the second facility in which the Plaintiff secured a sum of Kshs 50,000,000/- was referred to by both parties as a "Further Charge".

45. Accordingly it is clear to me that the Plaintiff executed contracts with the Defendant whereby monies were advanced to the Plaintiff. In its own admission, the Plaintiff fell in arrears leading to the demand from the Defendant. According to the Plaintiffs, the sum due from them to the Defendant is in the region of Kshs 64 Million. At the trial herein, it was admitted that since this suit was filed and an order of injunction obtained on 6th May 2016, the Plaintiffs stopped servicing the loan. That can only mean that whatever sum was due then may have accumulated further by way of interests.

46. As it were, one of the major reasons for filing this suit was the contention that the Defendant had imposed unlawful, irregular and arbitrary interest and other penalties as a result whereof the debt shot up by more than Kshs 10,000,000/-. The Plaintiff did not however lead any evidence to support the said allegations. According to PW2, they had intended to instruct the Interest Rate Advisory Centre (IRAC) to compute the proper interest due and to prove that the Defendant was charging arbitrary interests and inflating the amounts outstanding. They however abandoned the exercise upon the discovery that IRAC's charges were too high. There is therefore no evidence placed before me in proof of that allegation and I say no more in regard thereto.

47. Finally, under Section 31 of the Banking Act, there are regulations known as the Credit Reference Bureau Regulations whereby every banking institution is under an obligation in law to report on a monthly basis the performance of the loan advanced to its customers. As Musinga J. (as he then was) observed in ***Martin Odhiambo & 3 Others –vs- Housing Finance of Kenya(2016)***eKLR:-

> ***"If a borrower has defaulted on a loan, it is mandatory that the bank shares his information with all other banks. The Plaintiff's 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 much as there may be a dispute as to the amount owed. The Plaintiff have not settled the loan advanced to them, neither have any efforts been made towards the same."***

48. In the matter before me, it is evident that even though there is a dispute as to the extent of liability, the Plaintiff itself admits that they were not servicing the loan regularly, especially after a fire is said to have destroyed the Plaintiff's Eden Roc Hotel. The Defendant was therefore in my view under a legal obligation to report the performance of the Plaintiff's loan to the Credit Reference Bureau and the Plaintiff's objection in my view is misconceived.

49. Be that as it may, Mr. James Oyuke (DW1) for the Defendant Bank admitted that the Statutory Letters of Demand had been sent to an address in Malindi and not the Plaintiff's address in Mombasa as provided under both the Charge and the Further Charge. He further conceded that the sum of Kshs 71,593,000/- cited in the said Notices were erroneous and in excess of the sum due from the Plaintiffs by about Kshs 9 Million.

50. Section 90(2) (b) of the Land Act, 2011 requires a three months' notice to be issued to the Chargor before the Chargee can move to exercise its Statutory Power of sale. From the Defendant's own admissions, it is apparent that no proper Statutory Notice was served upon the Plaintiff and the Chargee's equity of redemption had not therefore matured.

51. In the circumstances, I will therefore bar the defendant from proceedings to offer for sale the suit property based on the purported Statutory Notice that was sent to an address other than the one indicated in the Charge and Further Charge executed by the Parties.

52. For the avoidance of doubt, save for the failure by the Defendant to serve a proper Statutory Notice, I find the Plaintiff's suit to be misconceived and untenable in its entirely. Accordingly if the Plaintiff remains in default as I have found herein, the Defendant shall be free to start the recovery process afresh and issue the proper notices as required by law.

53. In light of the role played by each party herein leading to this determination, I think it is fair that each party should bear their own costs.

Dated, signed and delivered at Malindi this 25th day of May, 2018.

J.O. OLOLA

JUDGE