



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 263 OF 2015**

**NICHOLAS KIHUMBA MAINA .....PLAINTIFF**

**VERSUS**

**CONSOLIDATED BANK OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**MARGARET ANINDO T/A IGAARE AUCTIONEERS .....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application for injunction to stop bank from exercising its statutory power of sale; bank agreeing to lend the plaintiff money for construction of a hotel and an overdraft for operations; loan for construction disbursed but overdraft not disbursed; bank arguing that there was no proof that hotel has been completed; no stipulation in the contract that overdraft was to be released only after completion of the hotel; bank aware that the plaintiff needed the overdraft to operationalise the hotel; prima facie case established as to whether the bank could call in the loan without first releasing the overdraft; injunction issued)***

1. This suit was commenced by way of a plaint that was filed on 18 September 2015. The plaintiff is the registered owner of the land parcel Nakuru Municipality/ Block 16/229 (hereinafter "the suit property"). In the month of September 2014, he procured a loan of about Kshs. 25,000,000/= from the 1st defendant (hereinafter "the bank") for purposes of constructing a hotel. He has pleaded that the sum of Kshs. 22,849,865.70/= was to be disbursed immediately with the sum of Kshs. 7,849,865.70/= being used to clear another existing loan and the balance to be used for construction of the hotel. He has pleaded that the rest of the loan money, Kshs. 2,000,000/= was to be disbursed no later than December 2014 to operationalize the hotel. The plaintiff has pleaded that the bank has failed to disburse this amount of Kshs. 2,000,000/= and he is therefore unable to conduct any business. It is his view that this is in breach of the contract that he had with the bank and also in breach of trust. Among the particulars of breach pleaded is that the bank failed to advance the Kshs. 2,000,000/= as working capital and also misled the plaintiff into that he would be advanced the sum of Kshs. 43,000,000/= yet only approved the amount of Kshs. 25,000,000/= which was not enough to complete his project.

2. It is pleaded that the bank has served the plaintiff with a statutory demand notice dated 14 May 2015 demanding the sum of Kshs. 25,077,844.75/= to be paid within 3 months and that the 2nd defendant, the auctioneer instructed by the bank, has served him with a 45 days redemption notice demanding the sum of Kshs. 26,745,132.45/=. The bank had scheduled to have the suit property sold on 26 October 2015 which prompted him to file this suit.

3. In the suit, the plaintiff inter alia wants orders of permanent injunction to stop the bank from selling his land, damages for breach of contract, an order directing the 1st defendant to occasion a second charge over the suit property, an order that his name be removed from the Credit Reference Bureau, release of a log book to a car, costs and interest.

4. Together with the suit, the plaintiff filed an application for injunction seeking to stop the bank from selling the suit property until this case is heard and determined. It is that application which is the subject of this ruling.

5. Besides the issues that he has raised in his plaint, the plaintiff has also contended that the bank wishes to sell the property without carrying out a valuation and that the interest rate charged is unconscionable. He has also deposed that the bank's branch manager promised that he would get a loan of Kshs. 43 Million. He has further deposed that the bank wishes to sell the property at Kshs. 54 Million yet the property is valued at Kshs. 66 Million.

6. The bank has opposed the application through the replying affidavit of Richard Mwaura, its Nakuru branch manager. He has deposed that the bank advanced a term loan of Kshs. 22,848,865.70/= and an overdraft facility of Kshs. 2,000,000/= to the plaintiff following a letter of offer that was executed by the plaintiff. The money was secured by a charge over the suit land which was charged for the sum of Kshs. 25,000,000/=. The sum of Kshs. 7,849,865.70/= was to pay off liabilities owed by the plaintiff and the sum of Kshs. 15,000,000/= was to be released in tranches against certificates of work done and bills of quantities for the hotel construction. The final tranche was released on 12 November 2014 on the plaintiff's representation that the construction would be completed on 31 December 2014. He has deposed that the construction is yet to be completed and the plaintiff does not hold a Certificate of Completion which would have been the evidence to warrant advancing of the overdraft facility. He has deposed that the overdraft facility was to be working capital and was only to be advanced upon proof of completion of construction. He has further averred that the plaintiff has been in default in repaying the loan as agreed. He has denied that the bank made any offer to advance the sum of Kshs. 43,000,000/= as alleged by the plaintiff.

7. I have considered the matter alongside the submissions of both counsels for the plaintiff and the bank. What I have before me is an application for injunction and the principles upon which a court assesses such application are well settled. The applicant needs to demonstrate a prima facie case with a probability of success, demonstrate that he stands to suffer irreparable loss if the injunction is not allowed, and where the court is in doubt, the application will be decided on a balance of convenience. These principles were laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***.

8. In this case, there is no dispute that the plaintiff applied for and was offered a loan of Kshs. 22,849,865.70/= and an overdraft facility of Kshs. 2,000,000/=. This is visible in the letter of offer dated 19 August 2014. The purpose of the loan was to clear outstanding liabilities of Kshs. 7,849,865.70/= and the rest to complete construction of the plaintiff's hotel. The overdraft was for working capital. There is no question that the loan was disbursed. Similarly, there is no contention that the overdraft has not been disbursed. The plaintiff complains that he needs to have the overdraft amount of Kshs. 2,000,000/= released so that he can start operations in the hotel. He has stated that without the overdraft, he is handicapped and cannot operate. Without operations, he cannot be able to repay the loan. The bank on the other hand has argued that the overdraft facility was only to be disbursed on proof that the hotel has been completed.

9. I have looked at the letter of offer. What I can see is that the plaintiff was offered a loan of Kshs. 22,849,865.70/= and an overdraft of Kshs. 2,000,000/=. I have not seen anywhere in it where it is said that the overdraft will only be released upon proof that the hotel has been completed and upon remittance of a completion certificate. To insist that the overdraft was only to be released when a completion certificate had been tendered, to me, at least at this stage of the proceedings, is a new clause being introduced by the bank which the parties never had in the first place. It would not have been too difficult to put in the letter of offer, that the overdraft of Kshs. 2,000,000/= will only be released once a completion certificate is tabled by the plaintiff.

10. I have also seen an internal memo of the bank dated 10 November 2014. It refers to a site visit undertaken by the bank officials on 30 October 2014. The memo states that the construction is going on well. The words "status of the contract executed" says it all. From the memo, I can see that the construction was at a very advanced stage. The bank officials themselves acknowledged as such in their memo. They gave opinion that the final tranche of Kshs. 3,400,000/= of the loan amount could be released so that the project may be completed.

11. Now the bank obviously expected to be paid the money that they had loaned. There is no problem with that. They knew that the plaintiff was borrowing the money to construct a hotel. Now, if they had agreed to lend Kshs. 2,000,000/= for operations, which they did not, where did they imagine the plaintiff will get money to operationalise the hotel? It goes without saying that the plaintiff was hoping to derive income from the hotel and that is how he was going to be able to repay the bank. The bank is now insisting on a completion certificate before releasing the same money that they had promised to release to the plaintiff without the need of a completion certificate. It may be that the hotel was not 100% complete, but who said that a hotel must be fully completed before one can operationalise it or start deriving income from it? I think, at least at this stage of the proceedings, that it was unreasonable for the bank to expect the plaintiff to pay them when they had not released a critical sum of money which they had promised the plaintiff to release. I have also seen the letter dated 23 March 2015 where the plaintiff was literally begging the bank to release the Kshs. 2,000,000/= so that he can start operations and start servicing his loan. 12. His pleas to have a further charge with another institution were also rebuffed if not entirely ignored.

13. A bank must act reasonably and in good faith while dealing with its customer. In the instance of this case, prima facie, the bank had a contract with the plaintiff where it agreed to lend the plaintiff both a construction loan and working capital. It knew that the plaintiff needed the working capital to raise funds for repayment. It needed to walk with its customer the whole hog and not abandon him midstream. The plaintiff got into the contract knowing that the bank would lend him both the construction loan and the overdraft. Maybe if he had been informed that the overdraft was conditional, he may not have entered into the contract. The situation here is akin to that of a boatman who promises to ferry you in his boat across a shark infested channel. He is definitely expected to ensure that you reach the other end for that is the contract that he has you. It cannot be permissible for him to get you midstream and now impose some more conditions, such as more money, and threaten that he will throw you off the boat if you do not comply. He cannot at that stage be heard to argue that he owns the boat just as the bank cannot be heard to argue at this stage that the money lent is its money. What I am trying to say is that new conditions ought not to be imposed in the midst of a contract unless they are agreed by the parties.

14. Let it not be thought that I am making a determination that a lender must release all money that he has promised before he can demand for payment of what he has lent. That is not what I am saying but there are special circumstances in this case. What I can see here is a lender who knew the very purpose as to why the borrower was giving it his property as security and was aware that the offer of security was on the expectation that the lender will release all the money that it has promised. I find it difficult to see the reasoning behind not releasing the overdraft money. If they could not release it, why didn't they allow the plaintiff to have a further charge as he had requested? I can see that the value of the works alone on the property was Kshs. 48, 103,000/= by the time the last tranche was being sought. As at 24 August 2015, the property was valued at Kshs. 66,500,000/= even in its incomplete stage. The forced sale value was Kshs. 50,000,000/=. I still cannot understand what was so difficult in releasing the Kshs. 2,000,000/= overdraft to the plaintiff. The bank was adequately covered, indeed more than twice over.

15. I think there is an issue to be tried as to whether the plaintiff was entitled to the overdraft before the bank could call in the loan. In my view, the plaintiff has laid down a prima facie case with a probability of success. If I do not issue the injunction he stand to lose his property. It is only fair, that pending hearing of this suit, the bank be restrained from selling the suit land. I make that order. The costs of this application shall be to the plaintiff in any event. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 17<sup>th</sup> day of May 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

Mr. Dulu holding brief for Mr.Kithi for the plaintiff /applicant

Mr. Okwengu for the defendant /respondent

Court Assistant : Nelima Janepher

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**