



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 220 OF 2015

TROPICANA HOTELS LIMITED.....PLAINTIFF

VERSUS

FIDELITY COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

Introduction

1. Before me are three Applications: one by the Plaintiff and two by the Defendant.
2. The Plaintiff's Application is dated 2nd December, 2015 and is seeking for the following orders:-
 - (a) **The Defendant by its directors, managers, employees, servants and agents be restrained from selling or offering for sale the Plaintiff's properties comprised in Title No. CR 10467 and known as Plot No.775 Malindi and CR No.10431 and known as Plot no. 776 Malindi (hereinafter referred to as the suit premises) pending the hearing and determination of this suit.**
 - (b) **The Defendant by its directors, managers, employees, servants and agents be restrained from reporting the Plaintiff to any Credit Reference Bureau as a defaulter pending the hearing and determination of this application**
 - (c) **The Defendant by its directors, managers, employees, servants and agents be restrained from reporting the Plaintiff to any Credit Reference Bureau as a defaulter pending the hearing and determination of this suit.**
 - (c) **Costs for this application be provided for.**
3. On the other hand, the Defendant has filed a Notice of Preliminary Objection dated 9th December, 2015 and a Notice of Motion dated 4th February, 2016.
4. In the Notice of Preliminary Objection, the Defendant has averred that this court has no jurisdiction to grant an injunction having regard to the cause of action sought by the Plaintiff and that the suit is statute barred by the provisions of Section 19(1) of the Banking Act (Credit Reference Bureau Regulations, 2013).
5. In its Notice of Motion dated 4th February, 2016, the Defendant is seeking for the following

reliefs:

(a) That the court be pleased to stay, discharge, set aside, vacate and review the order and ruling issued by this honourable court by Honourable Justice S. Chitembwe on 3rd day of December 2015 granting an order of injunction directed to the Defendant, its directors, managers, employees, servants and agents restraining them from reporting the Plaintiff/Respondent to the Credit Reference Bureau as a defaulter pending the hearing and determination of this suit.

(b) THAT the Defendant be granted unconditional leave to defend this suit within such time as the Honourable Court may deem fit.

(c) THAT the Plaintiff/Applicant be ordered to deposit the entire debt owed to the Defendant and in any event not less than fifty percent (50%) of the same amount to Kenya shillings Ninety Million (Kshs.90,000,000) as security pending the hearing and determination of this application and subsequent suit.

(d) THAT the draft Defence annexed hereto be deemed duly filed and served.

6. The parties agreed to argue the three Applications together.

The Plaintiff's case:

7. In support of the Plaintiff's Application, the Plaintiff's director deponed that the Plaintiff is the registered proprietor of plot number 775 Malindi (the suit property); that the property is charged under a charge and a further charge to the Defendant and that the Plaintiff owes the Defendant money in Euros and Kenya shillings.
8. According to the Plaintiff's director, a dispute has arisen out of the excessive interest charged by the Defendant and that the Defendant has not served any statutory notice and therefore has no right of exercising its statutory power of sale.
9. The Plaintiff's director has deponed that the Defendant agreed to review the excessive interest debited to the Plaintiff's account but instead of reviewing the excessive interest, the Defendant has threatened or blackmailed the Plaintiff to report the Plaintiff to Credit Reference Bureau.
10. According to the Plaintiff's Director, should the Defendant report it to the bureau, its name will be soiled and it will not be able to obtain credit facilities for seven years; that the threatened sale and blackmail concerning Credit Reference Bureau is illegal and premature because the Defendant has not complied with the provisions of the Land Act, 2012 and the Land Registration Act and that the Plaintiff cannot exercise the option to sell the suit property by private treaty or approach another bank to take over the facility until the excess interest is reversed.
11. It is the Plaintiff's case that the value of the property is in excess of Kshs.1 billion while the amount claimed by the Defendant is less than 200 million and that the Defendant is adequately secured.
12. In his Further Affidavit, the Plaintiff's director deponed that the Defendant has been levying fixed annual charges on the Plaintiff's account by way of commitment fees as though the Plaintiff has been acquiring fresh credit facilities for the same amount every year; that when those charges are reversed and when excessive interest is reversed, the Plaintiff's accounts will be regular and that the Plaintiff did not derive any or full benefit from the charge and therefore the charge fails for want of consideration.
13. According to the Plaintiff's director, he has not seen any statement indicating that the Plaintiff received the sum of 1,000,000 Euros.
14. The Plaintiff's director finally deponed that there is a dispute on the validity of the charge and the amount due to the Defendant; that the threat to report the Defendant to the Bureau was not made in good faith; that the valuation report annexed on the Defendant's Replying Affidavit is out dated and that the Plaintiff has received a report from an auditor showing that the Defendant had charged excess interest in the sum of Kshs.4,948,148.69.

The Defendant's case:

15. The Defendant's Legal Officer deponed that as at December, 2014, the overdraft facility to the Plaintiff had been increased to an excess of Kshs.33,700,000 against the limit of 25,000,000; that the Defendant requested to have the said limit increased to Kshs.50,000,000 which increase was approved and that as at November 2015, the overdraft facility was outstanding at Kshs.71,593,000. All along, it was deponed, the 1 million Euro loan was still outstanding.
16. It is the Defendant's case that the Plaintiff's account has perpetually been in arrears and that that is why the Defendant served a notice of its intention to submit its negative credit information to the Bureau as required under the Banking Act over a debt of Kshs.185,463,331 as at 21st November 2015.
17. It is the Defendant's deposition that the Defendant is obliged to provide such listing to the Bureau and that in any event, the regulations protect the Defendant, who has acted in good faith from liability and hence the suit is a nullity and should be struck out.
18. According to the Defendant's legal officer, this suit is meant to frustrate the Defendant in its recovery efforts considering that the Defendant has stopped servicing its loans.

Submissions:

19. The Plaintiff's advocate submitted that the Application before the court is to prevent the listing of the Defendant at the Bureau because once a listing is done, it is irreversible for 7 years.
20. The Plaintiff's counsel submitted that the purported immunity in Section 19 (1) of the Regulations is not absolute; that Regulation 19(1) came into force in 2013 and cannot have retrospective effect; that a suit can lie against an institution mentioned in the regulation if the thing done is not done in good faith and that the Plaintiff has demonstrated the absence of good faith on the part of the Defendant.
21. Counsel submitted that the charge document is invalid; that there exists a dispute on the amounts due and that sub-regulation 19(2) is the worst piece of subsidiary law because it seems to authorise false and fraudulent information to be given out by banks, financial institutions and CRBs and the customer whose name has been soiled and cannot do anything about it.
22. The Plaintiff's counsel submitted that the right to be heard and the right to a fair trial cannot be limited and that the Defendant is already over secured.
23. On the issue of whether this court has jurisdiction to deal with the dispute, counsel submitted that the Defendant's Defence has admitted the jurisdiction of this court.
24. The Defendant's advocate submitted that the matter is purely of a commercial nature; that the mandate of this court is to hear and determine disputes relating to the environment and the use and occupation of and title to land and that in any event, these proceedings are expressly barred by the Banking Act (Credit Reference Regulations, 2013).
25. Counsel submitted that if a borrower has defaulted in a loan, it is mandatory for a bank to share this information with all other banks and that the Plaintiff can challenge the contents of the information through the process provided for under Regulation 20.
26. The Defendant's advocate submitted that the material placed before the court does not entitle the Plaintiff to obtain injunctive orders and that the Plaintiff has not established the principles that were set out in the "Giella case" for injunctive orders to issue.

Analysis and findings:

27. The issues arising from the pleadings and submissions in this matter are as follows;-

- (a) **Whether this court has the requisite jurisdiction to deal with this matter.**
- (b) **Whether the order of injunction restraining the Defendant from reporting the Plaintiff to the Credit Reference Bureau (the Bureau) should issue and;**
- (c) **Whether an order of injunction restraining the Defendant from selling or offering for sale the suit property should be granted.**

28. Although in the Notice of Preliminary Objection, the Defendant only challenged the jurisdiction of this court on the ground that Rule 19(1) of the Banking Act (Credit Bureau Regulations, 2013) prohibits the Plaintiff from filing the suit, in her submissions, the Defendant's counsel further objected to the hearing of the Applications by this court on the ground that the matter before the court is purely contractual.
29. This court was established pursuant to the provisions of Article 162(2)(b) of the Constitution and Section 4(1) of the Environment and Land Court Act.
30. This court's mandate is to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.
31. Section 2 of the Land Act and the Land Registration Act have defined the "court" to mean the Environment and Land Court established under the Environment and Land Court Act, 2011.
32. In the amended Complaint dated 12th February, 2016, the Plaintiff is seeking for several declaratory orders, including a declaration that a charge is not enforceable until and unless it is registered with the Registrar of companies and that the charge document is not enforceable as it was not executed in accordance with the law; a declaration that the charge to facilitate the purchase of shares in the Plaintiff is a nullity and for a declaration that the Plaintiff did not receive the sum of 1,000,000 Euros which was secured by the charge.
33. The Plaintiff is also seeking for a permanent injunction restraining the Defendant from enforcing the security in any manner or form before it serves the statutory 90 days notice and for a permanent injunction restraining the Defendant from reporting the Plaintiff to any Credit Reference Bureau until the amount due is determined by the court.
34. It is not in dispute that the contractual relationship between the Plaintiff and the Defendant is grounded on the charge dated 31st December 2010 and registered in the land registry, Mombasa on 11th January, 2011 and the Further charge dated 28th August, 2012 and registered on 4th September 2012.
35. According to the Further charge, the total amount that was advanced to the Defendant and secured under the charge and the further charge was 1,000,000 Euros and Kshs.50,000,000 plus interest and other charges respectively.
36. The Plaintiff is disputing that it ever received the stated consideration of 1,000,000 Euros and that the amount that the Defendant is claiming under the Further charge is in excess by over Kshs.4,000,000.
37. It is trite law that charges are governed by Part VII of the Land Act and Part V of the Land Registration Act.
38. Any dispute arising from the two statutes can only be resolved by this court and not the High Court.
39. Consequently, the issue as to whether the contractual obligation between the Plaintiff and the Defendant that was created by the charge and the further charge has been breached or not can only be dealt by this court.
40. Indeed, it is the alleged breach of the terms of the charge and the further charge that necessitated the Defendant to inform the Plaintiff that it will report it to the Credit Reference Bureau unless it regularised its loan accounts.
41. In view of the definition of "the court" in the Land Act and the Land Registration Act, and considering that all charges are governed by the two statutes, I find and hold that this court has the jurisdiction to hear and determine this suit.
42. The Defendant's second limb of its Preliminary Objection is that this court has been barred by Regulation 19(1) of the Credit Reference Regulations which provides as follows:-

"19(1) A suit, prosecution or other legal proceedings shall not lie against the Central Bank, Bureau, an institution or chairperson, director, member, auditor, adviser, officer or other employee or agent of such Bureau or institution or any other person authorised under these Regulations to submit, receive, use or share credit information, for any loss or damage caused or is likely to be caused by anything which is done or intended to be done in good faith in pursuance of these Regulations or guidelines issued hereunder"

43. The above Regulation does not bar a person from instituting a suit against an institution seeking

- for an order restraining it from submitting information relating to the person to the Credit Reference Bureau.
44. The Regulation only protects the Central Bank, the Bureau or an institution from a suit or prosecution seeking for any losses or damage caused or that is likely to be caused by anything which is done or intended to be done in good faith in pursuance of the Regulations.
 45. The Plaintiff in this matter is not seeking for damages or loss caused or which may be caused by the information that the Defendant may provide to the Bureau. The Plaintiff is seeking to restrain the Defendant from sending such information on the ground that it is premature to do so.
 46. In any event, even if the suit by the Plaintiff was for loss or damages caused or is likely to be caused by the Defendant's action of having the Plaintiff listed by the Bureau, which is not the case, the issue of whether the listing of the Plaintiff (which has not happened yet) was done in good faith or not is a matter of fact that can only be dealt with at the trial.
 47. The question as to whether the suit can be filed against an institution for damages or loss can therefore only be addressed after the trial and not as a preliminary objection.
 48. I say so because evidence will have to be led to show that when the Institution, the Central Bank or the Bureau listed the person, it took into account the fact that the person so listed had been given a fair hearing before his name was listed, considering the loss and damages that may arise after a person has been listed. That is why the Regulation only prohibits the filing of a suit for loss or damages occasioned by the listing, if the listing is done in good faith.
 49. However, the above scenario is not the case before me. It is for those reasons that I find the Defendant's Notice of Preliminary Objection to be unmeritorious.
 50. I will now turn to the question of whether I should, firstly, restrain the Defendant from reporting the Plaintiff to the Credit Reference Bureau and secondly, from selling or offering for sale the suit property.
 51. The Plaintiff's case is that the sum of 1,000,000 Euros was advanced for purposes of acquisition of shares in the Plaintiff's company and that the Plaintiff did not derive any benefit from the charge.
 52. According to the Plaintiff, the Defendant has not provided any bank statement to show that it credited the Plaintiff Euro account with 1,000,000 Euros.
 53. The Plaintiff does not dispute the advancement of Kshs.50,000,000 to it which necessitated the creation of a further charge. However, the Plaintiff has alleged that the Defendant has levied excessive interest on the amount and illegal commitment fee.
 54. The Plaintiff has annexed on its Affidavit a report by Waweru Kimathi & Associates, a firm of auditors, showing that the Defendant overcharged interest on the Kenya Shillings account by Kshs.4,948,148.69.
 55. The Defendant has not produced a report to counter the report of Ms Waweru Kimathi & Associates on the alleged excessive interest that has been charged on the Plaintiff's account.
 56. Indeed, this court cannot at this stage state whether the report by Waweru Kimathi & Associates is factual or not.
 57. However, in the absence of another report to show that the figures quoted by Ms Waweru Kimathi & Associates are outrightly non-existent, the court is bound to allow that issue to proceed to hearing at a full trial.
 58. Until the issue of the alleged excessive interest, which the Plaintiff informed the Defendant in writing, is resolved, it will be reckless, both on the part of the court and the Defendant, to allow the listing of the Plaintiff at the Credit Reference Bureau pursuant to the provisions of the Credit Bureau Regulations, 2013.
 59. I say so because according to the Defendant's own email of 21st October 2015 and the Regulations, once a negative report is made to a Credit Reference Bureau, such a report will be retained by the Bureau for seven (7) years, thus jeopardising the Plaintiff's future interests in terms of accessing loan facilities.
 60. As long as the issues I have raised above are still pending, it will be premature for the Plaintiff to report the Defendant to the Bureau as indicated in its correspondence.
 61. It is not in dispute that the Defendant has not issued the required notices to the Plaintiff to enable it exercise its statutory power of sale of the suit property. Consequently, the Defendant cannot purport to exercise its statutory powers of sale of the suit property.
 62. It is for the reasons I have given above that I allow the Plaintiff's application dated 2nd December, 2015 as prayed and dismiss the Defendant's Preliminary Objection dated 9th December 2015 and

the Notice of Motion dated 4th February, 2016 with costs save for prayer number 3.

Dated, signed and delivered in Malindi this **6th** day of **May**, 2016.

O. A. Angote

Judge