Virchand Virpal & Sons Limited & 4 others v I&M Bank Limited (Civil Suit 259 of 2010 & 205 of 2011 (Consolidated)) [2024] KEHC 913 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 259 OF 2010 & 205 OF 2011 (CONSOLIDATED)

A MABEYA, J

JANUARY 30, 2024

BETWEEN

VIRCHAND VIRPAL & SONS LIMITED ..... 1ST PLAINTIFF

HASMUKHLAL VIRCHAND SHAH ..... 2ND PLAINTIFF

CHANDULAL VIRCHAND SHAH ..... 3RD PLAINTIFF

SUNIL CHANDULAL SHAH ..... 4TH PLAINTIFF

ATUL CHANDULAL SHAH ..... 5TH PLAINTIFF

AND

I&M BANK LIMITED ..... DEFENDANT

AS CONSOLIDATED WITH

CIVIL SUIT 205 OF 2011

BETWEEN

CHANDULAL VIRCHAND SHAH ..... 1ST PLAINTIFF

ATUL CHANDULAL SHAH ..... 2ND PLAINTIFF

HASMUKHLAL VIRCHAND SHAH ..... 3RD PLAINTIFF

AND

I&M BANK LIMITED ..... DEFENDANT

JUDGMENT

1. This judgment relates to two suits, namely, HCCC No. 259 of 2010 and HCCC No. 205 of 2011, which were consolidated for hearing and determination by the consent of the parties on 2/6/2017 by Sewe J. HCCC No. 259 of 2010 was designated as the lead file.

2. In HCCC No. 259 of 2010, by a plaint amended on 7/3/2012, the 1st to 5th plaintiff sought: -

    1. A declaration that all interest, pending and other charges levied on the 1st Plaintiff's account is illegal, unlawful and irrecoverable and that the Plaintiff is not indebted to the Defendant over the overdraft facility.

    2. Special damages of Kshs. 17,129,714.56 together with interest at commercial rates.

    3. An order that the Defendant do render a true and complete account of all their dealings with the Plaintiff including the proceeds of sale obtained from the sale of pledged shares.

    4. Costs of the suit and interest.

3. In HCCC No.205 of 2011, by a plaint dated 30/5/2011, the 2nd, 3rd and 5th plaintiffs sought a declaration that they are not indebted to the defendant in relation to the facility therein.

4. The background to the suits is that on 30/6/2006, the bank offered the 1st plaintiff (the principal debtor) an overdraft facility for Kshs. 8,000,000/- for financing working capital, secured by a legal charge over the property known as L.R. Mombasa/Block XXVI/380 Kizingo and joint and several guarantees and indemnities of the 2nd to 5th plaintiffs.

5. On 8/10/2007, the facility was renewed and an additional facility was granted for Kshs. 80,000,000/- for trading in listed shares secured by the pledged shares. A memorandum of deposit creating a lien over all existing and future shares was also executed.

6. Under Clause 10 para (h) of the offer letter, the principal debtor agreed to maintain a 120% margin of security by either making additional payments or offering additional securities. Under Clause 10 (i), upon the principal debtor's failure to regularize the facility, the bank was authorized to sell all or part of the pledged securities through forced sale or otherwise at its discretion.

7. In or about August, 2009, the bank sold the charged property and the pledged shares upon alleged default by the principal debtor. The plaintiffs' claim against the bank is for damages for breach of contract arising from the 8 months' delay in sale of the pledged shares after the 120 % margin was variously breached starting from 7/1/2009.

8. The particulars of the claim are that the bank breached its fiduciary duty to sell the pledged shares immediately upon breach of the 120% margin. That due to the delayed sale of the pledged shares, the plaintiffs suffered loss of Kshs. 17,129,714.56 due to fluctuation in share prices.

9. The defendant denied the claim through a defence amended on 15/3/2012. It contended that it severally invoked its right under clause 10(i) of the renewed facility. First, in February 2008 and on 10/3/2008, the 1st plaintiff renewed the facility for one year. Secondly, in October 2008, whereupon the 1st plaintiff sought to enhance the legal charge and executed a third further charge over the charged property dated 29/1/2009 to secure the existing facility. Thirdly, in December 2008 when the plaintiffs once again breached the 120% margin but requested the bank not to sell the pledged shares in the first quarter of 2009 because of the prevailing market situation.

10. Eventually, the bank opted to exercise its right to lien and sold the pledged shares as the principal debtor did not regularize its account as promised. The bank contended that the plaintiffs are not entitled to the special damages claimed as they are misconceived and without legal basis.

11. At the trial, the plaintiffs called two witnesses while the defendant called one.Sunil Chandulal Shah (the 4th plaintiff) testified as Pw1. He adopted his witness statement dated 28/9/2012 and produced the plaintiffs' bundles of documents dated 12/10/2012 and 12/2/2013 as PExh1 and PExh2, respectively.

12. He testified that at the breach of the 120% margin on 7/1/2009, the plaintiffs neither pledged additional shares to bring the cover to within the limit nor paid any money to restore the margin. That the defendant only commenced the sale of the shares in August 2009, after a delay of 8 months. By reason of the delay, the plaintiffs suffered a loss of Kshs. 17,129,714.56.

13. According to PW1, this amount represented the loss in monetary terms, which the plaintiffs would have retained upon prompt sale of the pledged shares as per the contract. He contended that if the defendant had sold the shares in line with the contract, the bank would have recovered what was due to it with a net balance of the amount claimed being credited to the principal debtor's account.

14. On cross examination, he admitted that under para. 8 of the memorandum of deposit executed on 22/10/2007, the plaintiffs agreed to maintain a specified level of security, either through providing additional approved collateral or making cash payments as per the bank's requirements.

15. He also confirmed that he received the letter dated 6/2/2008 from the bank stating that the margin had been breached and requiring them to either provide additional securities to cover the exposure caused by the depletion of the value of the securities due to price fluctuations or consider selling off some of the shares and apply their proceeds to the limit to reduce it.

16. He confirmed that the bank issued another letter dated 9/12/2008, advising the 1st plaintiff that its account was out order as at 8/12/2008 and requesting it to regularize the excess of Kshs. 39,453,178/- by either making payment to reduce the outstanding balance or pledging additional security. That in response, the 1st plaintiff wrote on 10/12/2008 requesting for some reprieve due to a significant decline in the share market and proposed the sale of the shares be in the first quarter of 2009.

17. He admitted that the principal debtor did not deposit Kshs. 30 Million as requested by the bank on 7/1/2009. That by a letter dated 14/1/2009, he told the bank that the market had not improved. That by a letter dated 6/2/2009, he sought more time to raise funds to meet the shortfall. In his letter dated 9/2/2009, he informed the bank that forced sale of the shares would not benefit either party as the share prices had plummeted to meltdown levels.

18. In re-examination, Pw1 stated that from July 2008, the share prices started going down and in January 2009, they touched the trigger point and that is when the bank should have sold the shares. He claimed that under Clause 10 (i) the bank could sell the shares at any time at its own discretion when it was favourable; that the bank had a duty of care and had to give immediate notice; and that under Clause 33, the bank's indulgencies did not affect the plaintiffs' obligations.

19. He clarified that although the expert indicated the loss to be Kshs. 15,570,050/-, the plaintiffs claim was for Kshs. 17,129,714/-. He abandoned para. 26 of his witness statement but claimed that he did not get true accounts.

20. Wilfred Abincha Onono, (PW2) adopted his witness statement dated 12/2/2012 as his evidence in chief. He told the Court that he prepared the schedule annexed to the plaintiffs' bundle of documents

from the documents presented to him by the plaintiffs and from the records obtained from the Nairobi Stock Exchange, which are available in the public domain.

21. According to him, the 120% trigger limit was breached on 7/1/2009. That at this point, the plaintiffs having breached the trigger point and having failed to provide additional shares or put in further funds, the bank was contractually bound to sell the pledged shares and owed the plaintiffs a duty to act in good faith by selling the shares to save itself from any losses but also to avoid exposing the plaintiffs to monumental losses. Hence, the bank owes the plaintiffs the sum of Kshs. 17,129,714.56.

22. On cross examination, he admitted that the plaintiffs numerously requested the bank to postpone the sale of the pledged shares after it had invoked Clause 10(i).

23. L. A. Sivaramakrishnan (DW1) testified on behalf of the defendant. He adopted his witness statement 18/12/2012 and produced the bank's bundles of documents dated 14/12/2012, 18/12/2012, 21/1/2014 and 31/10/2016 as DExh1-4.

24. He testified that the sale of shares commenced in September 2009. That as from 7/1/2009, there was no mark-up of the deficit, but under Clause 10(i) sale of the pledged shares was either through forced sale by the bank at the bank's discretion or with consent of the borrower.

25. In cross-examination, he confirmed that the net safety margin was set at 120% and that the plaintiffs had authorized the bank to sell the pledged shares in the event of breach of the net safety margin. That there was breach of the safety margin on 6/2/2008, 9/12/2008 and on 14/1/2009, respectively the bank indulged the plaintiffs by delaying the sale of the shares because the plaintiffs were its valued customers.

26. The parties filed their respective submissions which are on record and which the Court has considered. The issues for determination are:-

    1. Whether the credit facility agreement required the bank to sell the shares immediately the 120% margin was breached;

    2. Whether the bank breached its fiduciary duty to the plaintiffs to sell the shares within a reasonable time;

    3. Whether in the circumstances, the bank is liable to pay damages as claimed.

27. As regards the first issue, the plaintiffs submitted that it was a term of the credit facility letter dated 8/10/2008, that once the 120% margin was breached, it was the bank's contractual obligation to sell the shares immediately or within a reasonable time. That since the shares were pledged as security, the bank was under no obligation to wait for the market to get better. Furthermore, where there was a conflict of interest in deciding on the timing of the sale of the pledged shares, the bank was entitled to give preference to its own over the plaintiffs.

28. The plaintiffs relied on Savings and Loan Kenya Limited v Mayfair Holdings Limited [2012] eKLR, Chitty on Contracts 28th Edition Volume 1 and Investors Compensation Scheme Ltd. v West Bromwich Building Society (1998) 1 W.L.R. at 912 for the proposition that the parties' intention ought to be ascertained objectively from the credit facility agreement which captured their intention.

29. On the other hand, the bank argued that clear and express terms in a contract leave no room for implied terms unless expressly provided. The bank submitted that it was not required under Clause 10 (i) of the credit facility letter to sell the pledged shares at any particular time. That there were several other options available to it upon breach of the 120% margin including notifying the plaintiffs of the breach requiring it to pay an additional sum or transfer additional securities to make up the required margin.

30. Clause 10 para (h) and (i) of the renewed facility provided as follows: -

> "(h) If at any time the prevailing market value of the Pledged Securities does not exceed by at least 120 per cent the amount of the moneys and liabilities under the Facility, the Borrower hereby undertakes to pay the Bank such sum of money as shall be required to make up the required margin or undertakes on demand and at the option of the Bank either to deposit with or transfer to the Bank or to trustees for or nominees of the Bank (as Bank may require), additional securities approved by the Bank to make up the required margin.
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> i. The Borrower hereby agree and authorize the Bank to sell all or part of the Pledged Securities through Forced Sale or otherwise, at the Bank's discretion, in order to regularize the Facility upon failure, after due notice by the Bank to the Borrower, to regularize the Facility. Such proceeds arising from such sales shall be net of all charges and commissions as specified under the existing regulatory guidelines, rules and procedures."

31. From the foregoing, it is clear that there was an obligation placed on the bank to sell the pledged shares immediately the 120% margin was breached. However, it would seem that before such sale, there was an obligation to give notice to the plaintiff of the breach and requiring them to make good that breach. Such notice included requiring the plaintiffs either to pay the required additional amount or offer additional securities to make up the required margin. It would therefore be upon failure and/or continued breach by the plaintiffs that the bank would proceed with the sale of all or part of the pledged shares.

32. The next issue is whether the bank breached its fiduciary duty to the plaintiffs for failure to sell the pledged shares within a reasonable time. The plaintiffs argued that the bank had the fiduciary duty to act in their best interest and that this duty was breached by the bank's 8 months' delay in selling the pledged shares. The plaintiffs further argued that the bank's failure to act promptly led to greater losses on their part.

33. The plaintiffs relied on Cuckmere Brick Co. Limited v Mutual Finance Limited [1972] 2 All ER 633 and Kenya Commercial Bank Limited v James Osebe [1982-88] 1 KAR 48 on the duty of a mortgagee to use reasonable care in choosing the time to sell. Housing Finance Company of Kenya Limited v Palms Homes Limited & Others [2002] 2 KLR 93 on banks' duty to sell mortgaged property with reasonable care; and Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 2 AC. 181 and Alghussein Establishment v Eton College [1998] 1 WLR 587 on the principle that a party cannot benefit from its own wrong.

34. On its part, the bank argued that the relationship between the parties was not fiduciary in nature but that of ordinary debtor-creditor and the only duty vested upon the bank in equity was to take reasonable precaution to obtain the fair or true market value, which was demonstrated.

35. The bank relied on Edward Thomas Foley v Thomas Hill & Others and Scavarelli v. Bank of Montreal [1848] 2 HL. CA 28; 9 E.R.1002 and Alberta Court of Queen's Bench in Alberta (Treasury Branches) v. King, 1990 CanLII 5939 for the proposition that the bank-customer relationship is not fiduciary unless special circumstances exist. The bank also relied on Hospital Products Ltd v United States Surgical Corporation. [1984] HCA 64 for the proposition that fiduciary duty (if any) must conform to and be consistent with the terms of the contract.

36. It is not in dispute that the breach of 120% safety net margin occurred on 7/1/2009. The bank commenced the sale of the shares in August 2009. The 4th plaintiff admitted that he severally requested the bank to forestall the sale due to the prevailing market situation. The bank acceded to his request.

37. In Sunil Chandulal Shah & 3 others v I & M Bank [2018] eKLR, Tuiyott J. (as he then was) observed that: -

> " Given the above scenario, where the responsibility is at the outset on the Borrower to right the breach, it would be against the spirit of that arrangement to hold that the Bank had an obligation or even a right to immediately sell the pledged Securities upon breach. The first step that the Bank could take was to demand amends from the Borrower.
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> Two issues then possibly arise. Can the Bank be said to be in default of its obligation if it does not make the Demand for regularization immediately there is breach, and/or if it does not proceed to immediately sell after the expiry of the period of the Demand Notice and in the face of continued breach?
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> There seems to be a tacit acknowledgement in the Article by Ope Banwo (cited by Counsel for the Plaintiffs) that the position may change depending on the actual nature of the relationship between a Bank and its Customer. Hear what he says:-
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> 'When a bank goes out of its way to give a loan, which by the way was never requested for or solicited by the customer like the case study in point, and then deliberately puts itself in the way of the client where the customer is forced to run the trading business based on advice and permission from them, the coloration of the transaction changes dramatically. Furthermore, in a situation where the contractual arrangement give the bank the right to decide which stock gets purchased and which not to purchase and also gives the bank the right to unilaterally sell the stock when the value drops to a certain point, the imputation of fiduciary duty of care cannot be escaped'.
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> Underscored in this opinion, and which cannot be begrudged, is that where a Lender relates with the Borrower more intimately than the everyday Lender, then the Lender risks assuming the higher duty of a Fiduciary.
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> However, in a arms-length loan transaction where the Lender remains a Lender and the Borrower a Borrower and there is no semblance of some sort of Joint Venture or partnership venture, it would be safe to hold that, as a general proposition, a Mortgagee is not a trustee of the Power of Sale for the Mortgagor. The Lender would generally have an unfettered discretion to elect when to sell the pledged security. In a typical arms-length relationship the Bank does not owe its customer a fiduciary duty and the positions of the two would invariably be competing. Yet this Court is not willing to accept that this is no more than a general proposition which may not hold true at all times. It has to be remembered that even in a conventional Debtor-Creditor relationship, the Creditor owes the Debtor a duty to act in good faith when enforcing its security so as to achieve the best or commercially reasonable price at the time of sale. While Lenders cannot be begrudged for delaying Sales in the hope of obtaining better bargains, they should not be excused when the delay is so reckless, fraught with mala fides and is commercially nonsensical that it leads to a foreseen or foreseeable substantial devaluation of the pledged Security."

38. I do find the above sentiments persuasive and the proper rendition of the law. In the present case, there was no evidence to show that the principal debtor's relationship with the bank was beyond the

ordinary creditor-lender relationship so as to give rise to the bank's fiduciary duty to sell the pledged shares immediately, in spite of its request to hold off the sale.

39. There was evidence that the plaintiffs, through the 4th plaintiff requested the bank to forestall the sale of the pledged shares. The plaintiffs argued that the correspondence between the parties ought not to be considered as the terms of the credit facility letter was in writing. For this contention, the plaintiffs relied on sections 97 and 98 of the *Evidence Act*, Halsbury Laws of England Volume 12 para 1353 at 535.

40. In Virchand Virpal & Sons Limited v NIC Bank Limited & 4 others [2020] eKLR, the court held: -

> " In the instant case, the Bank is relying on inter alia; the letters from the Principal debtor to justify the delay in selling the shares. However, first and foremost, those correspondences cannot supersede or override the express terms of the letter of offer and in particular condition (1) of Annexure I. Secondly, the letters of; 30th January 2009 and 25th February 2009, were written long after the bank had already written to the principal debtor on, 9th September 2008 and 7th October 2008, indicating that the Principal debtor had burst the 60% margin.
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> In the same vein, the Bank cannot argue that, by the Principal debtors providing additional shares and/or depositing funds to regularise the account, it is justified in the delay to sell the shares. This is because as, a matter of fact, the Bank commenced sell of the shares on; 26th February 2009, due to the Principal debtor's failure to make the first payment of the four proposed payments by instalment, thus the additional shares and/or funds did not maintain the 60% margin. In fact, in the emails send by Mr Ellie Mwamburi, referred herein, the Bank indicate that even interest was in arrears.
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> Therefore, in my considered opinion, the Bank's argument that it indulged the Principal debtor does not assist it; for it was strictly bound by the terms of the letter of offer. If the Bank therefore suffered any loss as a result of its delay in selling the shares on the due date, then it must bear and/or shoulder the loss.
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> However, the Principal debtor too cannot run away from the letters written to the Bank to delay the sale and that is where the doctrine of estoppel comes in. From the correspondence herein, it is clear that, the Principal debtor sought for indulgence because it was in default. It is therefore estopped from denying any liability that, may arise as a result of delayed sale. Further, by virtue of giving additional shares and/or making deposits, after default, they led the bank to believe that, they would not challenge the Bank's action to delay the sale of the shares. The principles of equity states inter alia that; "He who goes to equity must go with clean hands"

41. In the present case, I have already found that the margin was breached in early January, 2009. The plaintiffs requested, and the bank heeded the request, to delay the sale of the shares because the business environment was unfavourable. Can the bank be blamed for indulging the plaintiffs? I don't think so. Both the doctrine of estoppel and the principle that one cannot benefit from own wrong come into play here.

42. On the whole therefore, I find that in the circumstances of this case, the bank did not breach its fiduciary duty to the plaintiffs. In addition, the bank was not responsible for the loss occasioned to the plaintiffs due to the delay in the sale of the shares.

43. Accordingly, the plaintiffs have not proved their cases to the required standard and the suits are therefore dismissed with costs.

It is so decreed.

DATED AND DELIVERED THIS 30TH DAY OF JANUARY, 2024

A. MABEYA, FCI Arb

JUDGE