Blay Energy Limited & another v Barclays Bank of Kenya Limited & another (Civil Suit E418 of 2023) [2024] KEHC 4187 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4187 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E418 OF 2023

A MABEYA, J

APRIL 30, 2024

BETWEEN

BLAY ENERGY LIMITED ..... 1ST PLAINTIFF

AFRICANA ENERGY LIMITED ..... 2ND PLAINTIFF

AND

BARCLAYS BANK OF KENYA LIMITED ..... 1ST DEFENDANT

NYALUOYO AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. Before Court is an application dated 1/9/2023. It was brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 40 Rules 1, 2, 3 and 4(1) of the Civil Procedure Rules.

2. Prayer numbers 1, 2 and 3 were spent. The remaining prayers sought to restrain the defendants or any of their representatives from advertising or selling by public auction on 5/9/2023 or at all the property known as Nairobi/Block 82/4137 ("suit property") pending the determination of the suit.

3. The grounds for the application were set out on the face of it and in the supporting affidavit of Amina Mohamed Hassan sworn on 1/09/2023. It was contended that the 2nd plaintiff was the proprietor of the suit property. That vide a letter dated 28/7/2023, the defendants advertised the suit property for sale by auction on 5/9/2023 pursuant to a charge against the suit property with the 1st defendant.

4. That the plaintiff and defendant entered into a facility agreement dated 22/3/2017 for Kshs. 50 million and a term loan dated 22/3/2017 for Kshs. 15,430,000/=. The facilities were secured through inter alia a charge over the subject property for Kshs. 65,430,000/=.

5. It was contended that the plaintiff was ready to pay the debt of Kshs. 1,863,876.05 on condition that the 1st defendant provided a proper reconciliation of the plaintiff's account. That in the circumstances, the 2nd defendant had no basis to attach or auction the suit property.

6. It was further contended that the 1st defendant was in breach of the charge document as it had failed to serve the plaintiffs with the notice to sell under section 96(2) of the *Land Act* a statutory notice pursuant to section 90 of the *Land Act*.

7. The 1st defendant opposed the application vide the replying affidavit sworn by Joseph Muli on 21/9/2023 as well as the grounds of opposition dated 9/9/2023. It was averred that the plaintiff had admitted to taking out two facilities with the 1st defendant and the suit property was charged.

8. That the 1st defendant also issued a letter of guarantee dated 10/10/2017 in favor of Total Kenya Limited and undertook to act as surety and guarantor of the plaintiff of any due payment for the sum of Kshs. 50 million within 5 days of being issued with a demand.

9. That Toyota Kenya issued the demand vide letter dated 31/10/2018 for Kshs.47,130,270/= on grounds that the plaintiff had failed to pay its debt arising from supply of petroleum products to them. That the 1st defendant honoured the claim on 7/11/2018 and debited the plaintiff's account no. 2028993008.

10. That vide a letter dated 8/1/2019, the 1st defendant issued the plaintiffs with a demand for Kshs. 49,819,037/= and demand to rectify the arrears within 14 days but they failed to comply.

11. That the plaintiffs were consequently served with 3 months statutory notice dated 16/5/2019 under section 90 (1) and (2) of the *Land Act* and 40 days statutory notice dated 3/9/2019 under section 96(2) of the *Land Act*. That the plaintiffs responded vide letter dated 13/9/2019 and admitted to being indebted to the 1st defendant for the sum of Kshs. 53,437,075.50 as at September 2019 and proposed to convert the facility into a term loan.

12. The 1st defendant countered with a proposal for upfront payment of Kshs. 30 million within 30 days and balance to be paid within 24 months equal installments of Kshs. 1,500,000/=. That vide letters dated 23/9/2019 and 11/10/2019, the plaintiffs counter proposed to pay Kshs. 7 million within 30 days and the balance within 48 months but the 1st defendant declined the counter-proposal and proceeded to instruct the 2nd defendant to issue a 45 days redemption notice and notification of sale which were duly served.

13. The 1st defendant further averred that the plaintiffs failed to disclose the outstanding debts being Kshs. 2,933,264.30 on term loan account ref 070OL01172130001 and Kshs. 56,919,551.20 in current account no. 2028993008 as per the attached statements of account. That the plaintiffs had obtained interim ex parte orders in Milimani CMCC No. 201 of 2020 Blay Energy Limited vs Barclays Bank of Kenya and Nyaluonyo Auctioneers and enjoyed the orders for three years until they were lifted on 17/7/2023 due to the plaintiff's unbecoming conduct in the suit. That the plaintiff's account statements were also provided in that suit contrary to the plaintiff's allegations.

14. In the premises, it was contended that the application did not raise any ground to justify the orders sought and that the plaintiff was bound to the contract it had signed. That the plaintiffs had also come to court with unclean hands having failed to disclose the true debts and had also admitted the debts thus they ought to have done equity themselves by paying the debt.

15. The plaintiffs filed submissions dated 26/10/2023 whereas those of the respondent's were dated 28/11/2023. This court has considered those submissions alongside the pleadings and evidence before

it. The simple task for this court is to establish whether the application has met the grounds for granting the injunctive orders.

16. The conditions for consideration in granting an injunction were settled in the case of Giella vs Cassman Brown & Company Limited (1973) E A 358. It was stated: -

> " First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

17. On whether the applicant established a prima facie case with probability of success, the plaintiffs submitted that they recognized an outstanding amount of Kshs. 1,863,876/= and that they had been paying the arrears of the loan accordingly and that the alleged disputed arrears ought to have been reconciled between the plaintiffs and the 1st defendant.

18. Respectfully, where the plaintiffs admit existence of a debt, a dispute over the exact amount owed cannot qualify as ground to establish existence of a prima facie. In Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, NBI CA No. Nai 227 of 1995 (108/95 V.R) (UR), the Court of Appeal held: -

> " Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."

19. The circumstances in which a mortgagee or chargee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725 as follows: -

> " The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."

20. There is no doubt that the plaintiff owes the 1st defendant a substantial amount of money. This Court upholds the view that a chargee cannot be restrained from exercising its power of sale merely because there exists a dispute as to the amount owing. It can only be restrained where the amount claimed is paid into court, or the amount is excessive or unconscionable. That has not been demonstrated in the present case.

21. As regards the contention that the plaintiffs were not served, the record shows that the plaintiffs were served with the mandatory 3 months statutory notice dated 16/5/2019 under section 90 (1) and (2) of the *Land Act* and 40 days statutory notice dated 3/9/2019 under section 96(2) of the *Land Act*. I note that the plaintiffs did not challenge the mode of service nor ownership of the addresses used to effect service. There was nothing else to support that a prima facie case had been established.

22. There was also overwhelming evidence that the plaintiffs and 1st defendant had been engaged in numerous correspondence on the debt and the consequent offers to settle the same. Though the plaintiffs pleaded that the outstanding loan was Kshs. 1,863,876/= they themselves produced the statement of the overdrawn current account marked as "AHM3" which indicated that as at 19/2/2020, the amount due was Kshs. 56,913,450.00/=. Evidently, the plaintiffs were being economical with the truth.

23. In circumstances, where the plaintiffs admitted that there was debt owed, and in light of evidence of service of mandatory notices, I find that a prima facie case was not established.

24. In light of that finding, this Court does not wish to be-labor on the other grounds as it will only amount to a futile judicial exercise. I only note to add that the plaintiffs admitted that the suit property was charged by the 1st defendant to secure the facilities lent to them.

25. It is trite that a lawful exercise of statutory power of sale cannot be used as a ground to establish irreparable harm. The 1st defendant's action was lawful and there was nothing to establish any irreparable harm on the part of the plaintiffs. By offering the suit property as security, the plaintiffs had equated it to a commodity which could be disposed of so as to recover the outstanding loan together with the interest thereon.

26. From the foregoing, it then follows that the balance of convenience tilts in favor of the 1st defendant who offered secured facilities years ago with a view to earning some profits but the plaintiffs defaulted in repayment.

27. The upshot is that the application dated 1/9/2023 is unmerited and is hereby dismissed with costs to the 1st defendant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2024.

A. MABEYA, FCI Arb

JUDGE