



REPUBLIC OF KENYA



KENYA LAW

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Seraphins International Limited & another v NCBA Bank Kenya PLC & 2 others (Commercial Case E293 of 2023) [2024] KEHC 4131 (KLR) (Commercial and Tax) (30 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E293 OF 2023**

A MABEYA, J

APRIL 30, 2024

BETWEEN

SERAPHINS INTERNATIONAL LIMITED 1ST PLAINTIFF

NAOMI WAITHERA GATHIRWA 2ND PLAINTIFF

AND

NCBA BANK KENYA PLC 1ST DEFENDANT

PETER MALESI 2ND DEFENDANT

LEGACY AUCTIONEERING SERVICES 3RD DEFENDANT

RULING

1. This ruling determines the plaintiffs' application dated 27/6/2023. The same was brought under Order 40 rule 1(a) and(b), 2(1) and Order 51 of the Civil Procedure Rules, section 1A, 1B and 3A of the *Civil Procedure Act*, Article 40 of the *Constitution* of Kenya 2010.
2. The application sought injunctive orders to restrain the 1st and 3rd defendant from selling, or disposing off the property known as Kajiado/Ololoitikoshi/Kitengela/1656 (hereinafter "the suit property").
3. In support of the application, the plaintiffs relied on the grounds set out on the face of the Motion and the supporting affidavit of Monica Nyambura Kariuki sworn on 26/6/2023. The plaintiffs' case was that, on or about September 2018, the 1st plaintiff won a tender advertised by Bidco Africa and a contract for the production and supply of Soya beans and sunflower beans.
4. In order to finance the project, the plaintiffs approached the 1st defendant for a facility and at the time communication was through the 2nd defendant who was an employee of the 1st defendant. That the 1st defendant agreed to finance the project with Kshs 5 million as revolving capital. That a letter offer



was issued on 10/8/2018 and the plaintiffs offered security to secure the legal charge for the said sum of Kshs 5,000,000.

5. In order to release the payment, the 1st plaintiff was requested to produce an invoice which was submitted on 5/11/2018. It was the plaintiffs' case that the 2nd defendant informed it to supply an individual invoice addressing the directors and not the company and the same was adhered to.
6. Subsequently, the loan was disbursed on 7/11/2018. That the entire loan amount was sent to Oliver David at KCB Bank Milimani at 1830 hours and efforts to reach the 2nd defendant was futile as his phone was off. The 2nd plaintiff she sent an email to the bank asking that the money be recalled. The 2nd defendant replied and asked that a hard copy of the document be delivered to the 1st defendant's offices.
7. That the bank only managed to secure USD 5000 which was refunded to the 1st plaintiff. The bank having failed to act swiftly, the rest of the money had been withdrawn. The plaintiffs made a report to the police. They contended that the 1st defendant failed to exercise reasonable care in handling the account thereby causing the plaintiffs to suffer substantial loss.
8. That thereafter, the 1st defendant sent auctioneers to the property and upon enquiry the 1st defendant stated that they were not aware of any fraud case concerning the property. That the 2nd defendant being an employee of the 1st defendant had perpetuated a fraud upon the plaintiffs and the defendants owed the plaintiffs a duty of care in handling the subject account.
9. The 1st defendant opposed the application vide a replying affidavit sworn by the legal counsel Jackson Nyaga on 18/7/2023. He confirmed that a loan of Kshs 5,000,000 was requested for by the 1st plaintiff for the purchase of stock to service orders from Bidco Company. That the plaintiffs offered the property known as Kajiado/olooloitikoshi/kitengela/1656 as security. The same was registered in the name of the 2nd plaintiff and the same was charged accordingly.
10. That the bank advanced the facility but the plaintiffs failed to honour their obligations in repaying the amount borrowed. As a result, on 19/11/2021, the bank issued a 90 days statutory notice and on 16/3/2022 the 40 days notice was issued. Since no payment was forthcoming, the bank instructed the auctioneers to advertise the charged property. He contended that the bank should be allowed to sell the property to recover the amount owed by the 1st plaintiff.
11. The 2nd defendant, Peter Malasi, opposed the application vide a replying affidavit sworn on 18/7/2023. He stated that he voluntarily resigned from his job contrary to the plaintiffs' assertion that he was fired from his job. That there was no cause of action arising from the duties and actions undertaken during his employment at the bank.
12. He averred that his involvement had been limited to loan processing and disbursement and carrying out instructions provided by the plaintiffs. He denied his involvement with David Oliver Nantocha and Nanchota Investment Company Limited and that the plaintiffs were obligated to do due diligence on their suppliers of Soya beans and Sunflower in Tanzania. He stated that the bank released the money to the accounts that had been provided by the plaintiffs vide the Profoma invoices dated 6/11/2018. That the 1st plaintiff's director signed a transfer of USD 45,240 to one Oliver Nantocha.
13. He further averred that the plaintiffs were advised to use the formal application procedure for cancellation of the payments done and the bank acted upon receipt of the same. That the fraud as alleged by the plaintiffs did not take place in the 1st defendant's bank and no complaint had been filed against him.



14. The application was canvassed by way of written submissions which I have considered. The plaintiffs submitted that the 2nd defendant was involved in all the transactions involving the revolving facility advanced to the 1st plaintiff. That it is the 2nd defendant who advised the plaintiffs to change the invoice from the company name to an individual in order for the payment to be finalized.
15. That the relationship between the plaintiffs and the bank was contractual and the defendants owed the plaintiffs a duty of care and skill in dealing with the 1st plaintiff's funds. That the defendants had failed to contact the plaintiffs to seek confirmation of the transfer and withdrawals and to act timeously when the complaint was lodged contrary to the standard commercial practice. That the 2nd plaintiff would suffer irreparable injury as she stands to lose her property on account of fraudulent activities orchestrated against her.
16. The defendants submitted that the bank issued the statutory notices which fact had not been denied by the plaintiff. That the applicant had only argued that she was defrauded USD 45,240 by third parties and that the bank breached its duty of care and skill. That the bank's obligation did not extend to dealings between the borrower and third parties and therefore was not obligated to check the contractual relationship between the applicant and Bidco Africa as well as the origin of the profoma invoice.
17. On irreparable loss, counsel submitted that the property had a known value and the bank was a financial institution capable of compensating the plaintiffs.
18. I have considered the pleadings on record and the main issue is whether the plaintiffs have met the threshold for the injunctive reliefs sought. The application before court seeks to prevent the 1st defendant from exercising its statutory power of sale with respect to the suit property.
19. The principles for grant of temporary injunctions are well set out in the case of *Giella –versus- Cassman Brown and Company Limited* (1973) E.A 385, at page 360 where Spry J. held that: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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.”
20. In *Mrao Limited –versus- First American Bank of Kenya and 2 Others* (2003) KLR 125, the Court of Appeal held that a prima facie case includes but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation or rebuttal from the latter.
21. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal held that: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion..... The standard of proof of that prima facie case is on a balance or, as otherwise put, on a



preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

22. It is not disputed that the 1st plaintiff had approached the 1st defendant for a facility to facilitate a tender which had been awarded by Bidco Africa for the supply of Soya beans and Sunflower seeds. It is also not disputed that the bank disbursed Kshs 5,000,000/- and a charge was registered against the suit property.
23. The plaintiffs contention is that a fraud had been perpetuated with respect to the funds deposited in the 1st plaintiff's account. The plaintiffs faulted the defendants for failing to exercise reasonable care and skill in handling the account. According to the plaintiffs, the bank ought to have called the 2nd plaintiff before making any payments and that it failed to act promptly to stop the illegal transaction as is the norm in the standard commercial practice. The plaintiffs further stated that they acted upon express instructions of the 2nd defendant who was at the time an employee of the 1st defendant
24. On their part the defendants stated that the loan had been disbursed and since the plaintiffs had not made the payments, the bank had the right to realize the security. The bank further observed that the requisite notices had been sent to the plaintiffs and that it was not party to any transactions between a third party and the borrower.
25. On *prima facie* case, I have considered the plaintiffs' averments in the pleadings before court. It is clear that the plaintiffs' case as against the defendants is with respect to alleged negligence on the part of the defendants in the handling of the funds loaned. That defendants failed to exercise reasonable care in handling the plaintiffs' bank account in respect of the disbursed funds.
26. It is evident that the funds disbursed were not beneficial to the plaintiffs. It is not clear how on disbursement, the money was received by one David Oliver Nantocha. The plaintiffs state that the defendants knew the purpose of the funds. That it is the 2nd defendant acting on behalf of the bank who directed them how the funds were to be transferred. Having disbursed and made a subsequent wrong transfer, the defendants failed to act swiftly and recoup the funds.
27. At this stage, the question is. Were the transactions, application for loan, disbursement and consequent transfer, independent of each other or were they one unbroken chain. If they were independent of each other then a *prima facie* case cannot be said to have been established. However, if they were a single unbroken chain, then it cannot be said that the funds were released by the bank for the purpose they were meant for. There would be no consideration for the security which is sought to be realized by the bank.
28. At this stage, on *prima facie* basis the Court is unable to go to the merits of the suit to establish whether or not the bank was negligent in handling the said amount. The plaintiffs' allegation of fraud cannot be determined at a *prima facie* level as there needs to be examination of evidence. That said, was there any consideration for the security that was created? That has to be established on examination of evidence. In the premises, the Court finds that the plaintiffs have established a *prima facie* case with probability of success.
29. With regard to irreparable harm, I recall what was stated in *Paul Gitonga Wanjau v. Gathuthi Tea Factory Company Ltd & 2 Others* [2016] eKLR. In that case, the court considered referred to Halsbury's laws of England and stated that: -

“First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff



may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

30. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others* [2014] eKLR, it was stated of irreparable injury or damage: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

31. Based on the foregoing, the question is, if it is ultimately found that the bank negligently handled the funds leading to their loss, would it be just to allow it in the meantime realize a security that was never perfected with the hope that it would be able to repay the same. I think not. The plaintiffs would suffer irreparable loss and damage.
32. The balance of convenience lies in preserving the property pending the outcome of the suit.
33. In the upshot, I find merit in the application and the same is allowed as prayed.

It is so ordered.

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

A. MABEYA, FCI Arb

JUDGE

