REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL ADMIRALTY & TAX DIVISION

CIVIL CASE NO. 247 OF 2017

BRITS FREIGHTERS LIMITED.......................................PLAINTIFF/APPLICANT

VERSUS

STANDARD CHARTERED BANK (K) LTD..........DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 25th May 2017, (herein "the Application), brought under the provisions of Article 159 (2) (d) of the Constitution of Kenya 2010; Order 10 Rule 11 of the Civil Procedure Rules 2010; Section 3A of the Civil Procedure Act; (Chapter 21, Laws of Kenya) and all other enabling provisions of the law.

2. The Applicant is seeking for orders as here below reproduced:-

a) That this Honorable court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from transferring, selling or in any other way interfering with the ownership of the Vehicle registration numbers: KBY 212A (Prime Mover), ZE 6286 (Trailer), KBY 572E (Prime Mover), ZE 6443 (Trailer), KBW 120Z (Prime Mover), ZE 4247 (Trailer), KBY 215A (Prime Mover), ZE 6287 (Trailer), KBY 176Z (Prime Mover), ZE 7002 (Trailer), KBV 027U (Prime Mover), ZE 6941 (Trailer), KCF 936E/ZF2398, KCF 937E/ZF2399, KBY 587Z, pending hearing and determination of the suit.

b) That this Honorable Court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from attaching, selling or in any other way interfering with the Land Title Numbers Kajiado/Kitengela 22518 and Kajiado/Kitengela 22519 or any other property of the Applicant and/or directors pending the hearing and determination of the suit;

c) That this Honorable Court be pleased to issue orders restraining the Respondents, their workers, agents or anyone acting on their behalf from listing the Applicant and/or directors in the Credit Reference Bureaus pending the hearing and determination of the suit;

d) That this Honorable Court do award any other orders it may deem just, fit and expedient to award in the interests of Justice;

e) That the costs of this Application be provided for.

3. The Application is based on the grounds on the face of it and an Affidavit dated 25th May 2017, sworn by Patrick Gitimu the Managing Director of the Plaintiff (herein "the Applicant). He deposed that on 16th September 2015, the Applicant borrowed loans in the total sum of Kshs 224,374,000.00, from the Defendant (herein "the Respondent) to finance its working capital requirements. The loan facilities were securitized by:

a) A legal charge over Kajiado/Kitengela/22518 & Kajiado/Kitengela/22519

b) A floating debenture over all the Applicant's assets couple with joint registration of log books of 17 vehicles complete with blank transfers of the same being trailers and prime movers as follows: KBY 212A (Prime Mover), ZE 6286 (Trailer), KBY 572E (Prime Mover), ZE 6443 (Trailer), KBW 120Z (Prime Mover), ZE 4247 (Trailer), KBY 215A (Prime Mover), ZE 6287 (Trailer), KBY 176Z (Prime Mover), ZE 7002 (Trailer), KBV 027U (Prime Mover), ZE 6941 (Trailer), KCF 936E/ZF2398, KCF 937E/ZF2399, KBY 587Z,

c) Directors personal guarantees

4. The loan facilities were as follows:

a) Existing Term Loan facility of Kshs 15,873,000.00;

b) Enhanced overdraft facility of Kshs 35,000,000.00;

c) Existing Term Loan facility of Kshs 69,001,000.00;

d) New Import letters of credit of USD 400,000.00 (inner to limit "d" above);

e) Existing bond and guarantees facility of Kshs 8,000,000.00.

5. It is averred that, although the Applicant fully availed securities and documentation to the Respondent, the Respondent denied it access to some of the facilities, thus frustrating its business efforts to pay and/or honor its commitment on the repayment. As a result, on 4th February 2016, the Respondent wrote to the Applicant informing it that, it was unable to continue supporting the Applicant with banking facilities.

6. That, on the 6th May 2016, the Applicant replied giving an update of their account status, the way forward, and requested for conversion of the amount of Kshs. 3,500,000, overdraft to a term loan payable in forty eight (48) months installments and on the 18th August 2016, the Respondent confirmed that the Applicant had been repaying the loan and acknowledged receipt of Kshs 800,000.00, paid into the account.

7. On 24th August 2016, the Applicant wrote to the Respondent offering a repayment proposal and requested to be given a favorable repayment period of 8 years to clear the loan. This was based on the fact that the draw downs had been limited. However, the Applicant indicated that, it was open to other options which could assist in lessening the loan. However, the Respondent wrote back demanding payment of the entire sum due by the 26th May 2017, giving the Applicant ten (10) days to make good the request.

8. The Applicant averred that it carries on a business in the Petroleum Industry and as at now, all the vehicles are in the possession of Third Parties pursuant to contracts and agreements in relation to the same. The Respondent's action was termed not only unfair to the Applicant but direct contravention of the pertinent sections of the Movable Property Security rights Act, the Chattels Transfer Act, and the Land Act, 2012.

9. The Applicant argued that it has all through been keeping the Respondent in the picture about its financial position and tangible business prospects and therefore the threatened action by the Respondent, is clearly informed by malice and crafted to ensure that the Applicant loses its property. That, the action has come just days before realization of the business prospects; a good example is a contract awarded to it transport fuel for; Future Energy Limited, to Burundi, Rwanda, South Sudan and Eastern DRC.

10. However, the Application was opposed vide a Replying Affidavit dated 29th June 2017, sworn by Stella Mburu, the Respondent's Account Manager, Group Special Assets Management and In- Charge of the Plaintiff's Account. She deposed that, the entire Application is based on incorrect and deliberate misrepresentation of the true facts.

11. That, the correct sequence of events are that; on 16th September 2015, the Respondent, at the Applicant's request advanced it, various facilities in the form of term loans and overdraft facilities totaling Kshs 224,374,000.00 as follows:-

a) Existing Term Loan facility of Kshs 15,873,000.00;

b) Enhanced overdraft facility of Kshs 35,000,000.00;

c) Existing Term Loan facility of Kshs 69,001,000.00;

d) New Term Loan Kshs 96,500,000.00

e) New Import letters of credit of USD 400,000.00

f) Existing bond and guarantees Kshs 8,000,000.00

12. The lending was secured by various facilities being:-

a) A charge for Kshs 24 million over the Plaintiff's Property Land Reference No. Kajiado/Kitengela 22518 and 22519;

b) An all asset debenture for Kshs 167 Million over the Plaintiff's assets together with a Supplemental Debenture dated 20th September 2015;

c) Joint registration of logbooks for all vehicles financed by the Defendant as provided in the facility letter dated 16th September 2015.

d) Director's personal Guarantees for Kshs 226 Million.

13. That, in breach of its obligation under the terms of the lending agreements, the Applicant failed to service the facilities advanced to it and as at 15th June 2017, the default stood as follows:-

a) The overdraft facility was overdrawn to a sum of Kshs54,096,020.25 over and above the limit of Kshs 35 million; and

b) The term loans stood at Kshs 101,162,147.93 plus accrued unpaid interest of Kshs 18,629,372.35;

14. It was averred that the Defendant duly notified the Applicant vide various letters of the breach and requested it to regularize its account but to date, the Applicant is yet to meet its monthly repayment obligations and/or present to the Respondent, a feasible repayment proposal. To support its averments the Respondent stated as follows:-

a) By a letter dated 16th January 2016, the Applicant requested it to reinstate the overdraft facility so as to support its working capital requirements and to reduce the applicable interest rates to 17% p.a. In response, the Respondent on 4th February 2016 acceded to the Applicant's request with regard to reinstatement of the overdraft facility to a limit of Kshs 35 million and also urged the Applicant to seek alternative funding to regularize its accounts which were running in arrears.

b) On 12th April 2016, the Applicant and the Respondent held a meeting to discuss the way forward with regard to the Plaintiff's indebtedness wherein the Applicant made a request for restructuring of the debt as well as extension of time to secure another financier. As at May 2016, the Applicant had not given it a proposal on repayment and by a letter dated 4th May 2016, the Respondent wrote to the Applicant demanding the following:-

i) An update on the proposed takeover of the facilities by another financier;

ii) A proposal for Restructuring of the debt; and

iii) A proposal for repayment of the overdraft facility debt which stood at Kshs 49,402,460 as at 3rd May 2016.

c) In response, the Applicant by a letter dated 6th May 2016 wrote to the Respondent and made the following proposals:-

i) conversion of the loan above the Kshs 35 million overdraft limit into a term loan payable over 48 months;

ii) commitment to make monthly repayments of Kshs 2 million for all the loans with the Respondent; and

iii) takeover option from a suitable financier.

d) The Applicant did not honor the indicated monthly repayment commitment and neither did it submit a restructuring proposal and for the period January to June 2016, it had only repaid a sum of Kshs 2.8 million out of the total outstanding debt of Kshs 49,200,018.15. That this necessitated the Respondent's letter dated 18th August 2016 wherein it urged the Applicant to submit a repayment or restructuring proposal on or before 22nd August 2016.

e) By letters dated 24th August 2016 and 3rd May 2017, the Applicant wrote to the Respondent detailing its business plan and sought restructuring of the debt by increasing the loan repayment period to eight (8) years, which according to the Respondent would in effect amount to rewriting a new contract.

f) On 24th April 2017, the Respondent wrote to the Applicant once again reiterating the Applicant's continued indebtedness which stood at Kshs 52,928,192.05 over and above the limit of Kshs. 35 million and calling for settlement of the debt.

15. The Respondent therefore argues that, as a result of the fact that the Applicant did not honor the commitments as enumerated hereinabove; the Respondent served it with a letter dated 15th May 2017, demanding the immediate repayment of the outstanding loan term facilities in the sum of Kshs 43,348,094.20 and the overdraft facility of Kshs 53,538,327.95.

16. However, it is averred that, despite the various demands, the Applicant has only made intermittent payments not sufficient to meet the monthly obligation and the debt continues to accrue. That it is also clear that, the Respondent has in the past extended accommodation and/or indulgence to the Applicant in good faith, including agreeing to restructure the facilities to give the Applicant an opportunity to remedy its default but the Applicant to be in default. Thus the Applicant is thus truly indebted to the Defendant in the sum of Kshs 54,096,020.25 in relation to the overdraft facility and Kshs 101,162,147.93 plus accrued unpaid interest of Kshs 18,629,372.35 under the term loans.

17. The Respondent averred that, the Applicant has not indicated how it intends to repay the outstanding debt and that the various contracts produced by the Applicant, between it and Third Parties, annexed to the supporting Affidavit, do not guarantee a repayment or assurance that the same will materialize.

18. That, in the given circumstances, no useful purpose will be served by delaying or postponing the realization of the securities since an event of default has arisen as contemplated under clause 15 of the Debenture and in the absence of a repayment proposal from the Applicant, the Respondent is entitled to call for the immediate payment of the outstanding debt and to exercise such powers provided under the Debenture.

19. In further response to the averments by the Applicant, the Respondent stated that it is not aware of any drawdown request that was submitted by the Applicant and not honored. That, the drawdown under the new term loan facility in the committed facility letter was to be done in tranches against presentation of invoices by the Applicant. In addition, the Respondent duly informed the Applicant in a meeting held in January 2016 that the it was unable to continue providing finance to it due to the poor performance of the its account and the Applicant requested to re-bank with another bank by 31st July 2016, which is yet to be done.

20. Finally the Respondent averred that, even then, the Application is premature as it has not commenced steps with regard to realization of the securities. In the circumstances, there is no basis for the grant of an interim injunction as sought for.

21. The Application was disposed of vide filing of submissions. The Applicant submitted that it has set out a clear prima facie case with very high chances of success, based on the fact that, the Respondent flouted their rights and the provisions of written law, and maliciously intended to disenfranchise it of its property, considering that the transfer of ownership can be done at any time, based on clause 15 of the supplementary Debenture without any notice whatsoever to it.

22. The Applicant referred the Court to the case of; *Mrao –vs- First American Bank of Kenya Limited & 2 others [2003] KLR 125,* where a prima facie case was described as follows:

> *"A prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the court, a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

23. The Applicant further submitted that it cannot be adequately compensated in damages and referred to the case of; *Gravet Ltd –vs- Mohamed Hassan Maalim & 2 Others [2013] eKLR* where the court stated as follows;

> *"I find that it has established a prima facie case in that the Applicant, being a shareholder of the 3rd Defendant Company, is apprehensive that the 1st and 2nd Respondents may be engaging the 3rd Defendant Company, in activities and business to its exclusion, and detriment. Having satisfied the 1st ambit of the Giella –vs- Cassman Brown case (supra), and court would only observe that the detriment suffered by the Applicant cannot be compensated for in foreseeable damages. As the court has found as above, there is no need to consider the balance of probabilities".*

24. It was submitted that, any transfer of ownership or sale of the vehicles would not only inconvenience many Third Parties, but also will invariably lead to civil suits against the Applicant for breach of contract and investable cancellation of the said contracts, like the one from National oil to Tullow oil, and that such a move will in a stroke cripple the Applicant.

25. It was submitted that, the issue of the balance of convenience, can only be delved into if the Honorable court is not fully satisfied with the first two principles of Geilla's case. However, any transfer of ownership or sale of the vehicles and land will lead to an absence of the suit property thus rendering the suit a nugatory and a mere academic exercise. It would amount to punishing the innocent Applicant for just relying on the laws.

26. Reference was made to the case of; *Alice Awino Okello –vs- Trust Bank Ltd & Another LLR No. 625 (CCK)* in which the Court of Appeal held that:

> *"The balance of convenience is in favor of the Applicant as the sale of one's property is a serious matter that deprives one of a right recognized in law and as such should not be allowed to proceed on doubtful circumstances"*

27. Finally, it was submitted that, the Respondent will not suffer any prejudice since in any case; the loan facilities are over secured by other securities that are in the Respondent's full control and the Respondent has not raised any legal grounds whatsoever to warrant the Application to be disallowed.

28. However, the Respondent filed response submissions and submitted that, the Applicant has not satisfied any of the principles in the celebrated case of; *Giella vs Cassman Brown & Co*.; being that;

> *(i) The Plaintiff must establish that he has a prima facie case with high chances of success;*
>
> *(ii) That the Plaintiff would suffer irreparable loss which cannot be compensated by an award of damages;*
>
> *(iii) If the court is in doubt, it will decide on a balance of convenience*

29. That, the Applicant has admitted default on the repayment of the facilities as set out in the Respondent's Replying Affidavit and the Respondent is legally entitled to commence the recovery process. The Court was referred to the case of; *Brade Gate Holdings Limited & Another -vs- Jamii Bora Bank Limited (2016) eKLR* where it was argued that, the Applicant must demonstrate that he has a right that is about to be infringed.

30. That having offered the vehicles as security to the advanced facilities, the Applicant cannot be heard to claim that it stands to suffer irreparable loss. The security offered became a commodity for value and no irreparable loss can be suffered. The value of the said securities is clearly determinable and the Applicant would in any event be adequately compensated in damages. Further, the parties contemplated the possibility of the securities pledged being sold off and in pursuit, the Applicant deposited blank transfers and the log books of the vehicles securing the facilities. The Applicant cannot therefore turn around and claim that it would suffer irreparable loss yet it was aware of this

eventuality in the event of default.

31. The Respondent submitted that the cornerstone of commercial transactions is the certainty the financial institutions have in realizing and recouping the amounts advanced in case of default by a borrower. Such certainty is all the more clearer when there is no dispute as to the default as in this case. The case of; *Brade Gate Holdings Limited & Another -vs- Jamii Bora Bank Limited (supra)* cited with approval in the case of; *Machakos HCCC No. 215 of 2008 Jopa Villas LLC –vs- Private Investment Corp & 2 Others*, was relied on where it was stated that Courts should not aid the Applicant running away from the obligations lawfully imposed, with its knowledge and participation, but should instead uphold the rights of the Respondent to recover the monies lawfully advanced. Thus Courts must uphold the sanctity of lawful commercial transactions

32. It was argued that the balance of convenience in this case is in favor of declining the prayers sought, the Application being unmerited as the Applicant has not demonstrated his entitlement to the injunction, based the principle that "he who comes to equity must do equity".

33. The Respondent submitted that an injunction order should not be liberally granted on flimsy grounds as sought by the Applicant. The burden is on the Applicant to support his claim and it cannot be so supported where the debt is admitted. The case of; *Cyn Energy Company Limited –vs- Synergy Industrial Credit Limited (2014) eKLR*, was relied on, where the Court stated that issuance of an injunction order to restrain the Defendant from exercising its statutory power of sale will amount to interference with the contract between the Plaintiff and the Defendant. However, the power under the Charge cannot be exercised without issuing the requisite statutory notices as required by the law.

34. It was also argued that the Application is premature as the Respondent has not taken up any steps to realize the securities given by the Applicant as such the prayer for an injunction is unfounded and premature. Reliance was placed on the case of; *A to Z Transporters Limited & 5 Others -vs- African Banking Corporation Ltd (2013) eKLR.*

35. I have considered the entire application and the arguments advanced and I find that there is no doubt that the parties herein entered into a banker-customer relationship which turned into a debtor-creditor relationship following the grant of credit facilities to the Applicant (Debtor) by the Respondent (the Creditor). From the averments in the Affidavits filed herein by the respective parties, there is no doubt that the Applicant has been experiencing difficulties in servicing the repayment of the loan facilities granted timely. Thus the default is not in dispute.

36. However, for the Court to grant the order of injunction sought, the Applicant must satisfy the principles in the case of; *Geilla –vs- Cassman Brown & Co. Ltd (1973)EA 358,* which are:

> *a) It must establish that it has a prima facie case with high chances of success;*
>
> *b) It will suffer irreparable loss that cannot be compensated by an award of damages; and*
>
> *c) If the court is in doubt, it will decide the case on a balance of convenience.*

37. The prima facie case to be established is a case which when weighed on the circumstances of the entire matter, it is established that the Applicant's rights have been or are likely to be infringed on by the Respondent hence the need to grant the orders sought (see *Mrao –vs- First American Bank of Kenya & 2 Others (2003)KLR 125)*.

38. I have considered the facts herein and in particular the Affidavit in support of the Application and I find that the Applicant admits that they were granted loan facilities totaling Kshs. 224,374,000.00. The loon was secured as herein stated. It is evident from the averments under paragraph 11 of the said Affidavit that the Applicant requested for a favorable repayment period indicating that they had difficulties in servicing the loan facilities. It is thus admitted that the Applicants were and are in arrears.

39. Subsequent to the filing of the Application, the parties engaged into negotiations with a view to settle the matter at the court but the Applicants had not offered any reasonable proposal for the repayment of the amount in arrears and/or owing and that it was abusing the injunctive order that had been issued.

40. On 8th December 2017, the court was informed that the Applicant had paid only Kshs. 500,000.00, whereas the arrears as at 13th October 2017 stood at Kshs. 23,703,698.20. There is no indication that this sum of money has been made good. Having heard the Application inter-parties, the Court ordered the parties to file documents to inform it on the following issues: how much money was advanced, how much has been repaid, how much is in arrears (if any), what is a reasonable proposal for repayment of arrears the Applicant is offering, how much is the Respondent willing to accept and what is the value of securities held. After the parties filed their respective reports, I considered the same and noted that the Applicant had proposed to make a monthly repayment of Kshs. 400,000.00 per month which was not acceptable bearing in mind that the monthly repayment was Kshs. 3,155,047.80. It was therefore evident that the parties would not agree on any proposal. The Court decided to render its decision on the Application.

41. It is therefore evident from the facts stated above that, the Applicant is not able to service the loan facilities granted as agreed and the Respondent is not willing to indulge it. That automatically entitles the Respondent to invoke its statutory power of sale. The purpose of a security is to secure the interest of the Creditor. If the Court were to restrain the Respondent from exercising its statutory power of sale, then there will be no need of any creditor taking a security while lending to take any security.

42. Therefore, if the Applicant wants any orders to restrain the Respondent from realizing the securities, then the Applicant must make good all the lawful, admitted and due amounts in arrears and commence forthwith with the timely monthly installments, otherwise the Respondent should be at liberty to exercise its statutory power of sale procedurally and accordingly.

43. It is against this background that I find that the Applicant has not made out a prima facie case with high chances of success and if at the

end of the trial it is established that the Applicant's rights have been infringed then it can be compensated by damages. The balance of convenience weighs in favor of the Respondent. It will therefore not be in the interest of justice to grant the orders sought.

44. The upshot of all this is that, the Application is dismissed with costs to the Respondent. The parties should prepare the matter for the hearing of the main suit.

45. Those then are the orders.

Dated, delivered and signed in an open court this 21st day of November 2018.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Okatch for the Plaintiff

Jaoko holding brief for Mr. Weru the Defendant

Dennis. ------------------------Court Assistant