REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 467 OF 2016

OCEANIC OIL LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

STANDARD CHARTERED BANK

KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING (2)

By Certificate of urgency application dated 3rd February 2020, filed together with Notice of Motion brought under the provisions of **Order 45 Rule 1, Order 51 Rules 1 and 3 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A, 63 (e) and 80 of the Civil Procedure Act** and all enabling provisions of the law, the Plaintiff/Applicant urged the court to be heard on priority basis for reasons;

a) That the Defendant/Respondent had already commenced the exercise of its Statutory Power of Sale over the suit premises through the Statutory Notice dated 26th September 2019 demanding Ksh 456,677,508.40/- despite the Plaintiff having all along been servicing the loan facilities in full as advanced to it by the Defendant.

b) That the Plaintiff had initially filed an application seeking the grant of Temporary injunction orders from the Defendant restraining them from disposing off its properties, unfortunately the same was dismissed on the 22nd November 2019.

c) That in dismissing the said application, the court noted and/or considered the aspect that no proof of imminent threat of disposing and/or alienation against the suit properties had been imposed on the Plaintiff/Applicant for the reasons that no Statutory Notice was served against them.

d) That as it stands, Statutory Notices have been served upon the Plaintiff/Applicant during the pendency of this suit in court, which are lapsing on or about the 14th February 2020 thus exposing Plaintiff/Applicant to imminent sale and/or disposition of its properties.

e) That unless restrained by the court at this stage and especially before the lapse of Ninety Days (90) notice, the Plaintiff will suffer irreparable damage and losses that cannot be compensated by way of damages, out of the action and/or inaction on the part of the Defendant/Respondent to honor religiously the terms of the loan agreement as stipulated.

In the Notice of Motion the Applicant sought Orders;

a) That pending the hearing and determination of this Application intepartes, the Court suspend and/or stay any intended exercise of the Defendant's Statutory Power of Sale.

b) That the Court reviews its orders made and contained in the Ruling delivered on the 22nd November 2019, and in place thereof grants orders sought in the application.

In the Supporting Affidavit sworn by Joseph Gachuhi Karoba Director of the Plaintiff Company, he stated that the Plaintiff/Applicant is the registered proprietor of all those properties known as Title Number Uasin Gishu/Mile Thirteen Scheme/73, Title Number South Ugenya/Yiro/2835 and Land Reference Number 209/136/65 (Hereinafter referred to as "the Suit Properties").

He asserted that in the year 2011, the Defendant sanctioned five facilities to the Plaintiff Company and the Deponent and other guarantors agreed to guarantee the facility extended by the Defendant amounting to Ksh 335,182,620/-.

The Plaintiff/Applicant executed four charges in favour of the Defendant over the suit properties to the said limit as legitimately expected and as per the contractual stipulations contained in the Offer Letter, the Loan Facility Agreement and Charge Documents.

The Applicant had over years been servicing the facilities and at no one time did they ever fall in arrears whatsoever prior to the date of filing this suit.

As a result of mismanagement of the Applicants accounts by the Defendant, the Applicant decided to have a sit down with the Defendant to try and get an explanation over the loan account statements to which the sit down ended in the Defendant sending the Applicants demands for payment of staggering sum of Ksh 456,677,508.40.

The Applicant stated that the said sum of Ksh 456,677,508.40 was grossly inflated, totally outrageous, obnoxious and further the process or procedure leading to the arrival of this amount is shrouded in mystery as the calculations used to calculate the same was not known to the Applicants neither is it founded on the terms of the Loan Agreement let alone registered Charge documents. The Bank statements filed by the Bank itself also show a different amount as well.

The Applicant stated that during the pendency of this suit, it engaged other potential buyers in an effort to offer the charged properties for sale while securing the Bank's interests as well as the Applicant's own interest. The said engagement led to the Applicant receiving various Letters of Offer towards the Charged properties with the potential of purchase over the same.

The Applicant approached this Court with the hope of getting Temporary Injunction restraining the Defendant whether by itself, agents or servants from commencing realization of security, exercising power of sale, advertising, selling, disposing, alienating transferring and/or in any other manner interfering with the Plaintiff's quite possession, occupation and enjoyment of all the suit properties, however the same was dismissed.

The Applicant stated that subsequent to filing of this suit in Court and during the pendency of the same, the Defendant through its agents who were aware of the pending suit in Court wrote/served the Applicant with Statutory Notices dated 26th September 2019 on 14th November 2019 requiring compliance within the specified period, failure to which, the Defendant would exercise its remedies as contained in the Charge document. Marked **JKG -001** is a copy of the said Statutory Notice.

The Applicant averred that at the time of dismissing the application for having not established a *prima facie* case to warrant the grant of Temporary Injunction, this Court's attention had not been made aware of the service or existence of the Statutory Notice. Therefore, it is upon this basis that the Applicant is approaching the Court to review its decision dismissing the Plaintiff's application for Temporary Injunction pending hearing of the main suit in order to preserve the suit Properties pending hearing of the matter.

The Applicant stated that if these orders are not granted the Applicant will suffer irreparable loss and damages since all its life time investments worth millions of shillings are in the suit properties since the bank would proceed to auction the property yet even during the pendency of the suit, one property was sold by private treaty and all the amount of Ksh 50,000,000/- given to the bank for which credit has not been given.

REPLYING AFFIDAVIT

The Application was opposed vide an affidavit dated 27th February 2020, sworn by Cecilia Muendo an Account Manager of the Defendant herein. She stated that the Defendant did not have a meeting with the Plaintiff to discuss the amounts outstanding since this Court delivered its ruling of 22nd November 2019.

Further that it Is not true that the Defendant had failed to give credit for the sale of one of the properties through private treaty. On 27th July 2018, the Defendant received Ksh 50,236,964.70 on account of the sale of Land Reference Number 3734/937 Lavington and produced Pg 1 of Exhibit marked **CM-2** a copy of July 2018 statement of Account Number 0102013486500 showing credit was given for the amount ofksh 50,236,964.70.

APPLICANTS SUBMISSIONS

Whether the plaintiff/Applicant has met the threshold for the grant of Review Orders?

The Applicant submitted that the grounds for Review are premised under the provisions of **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010**.

It was Applicant's submission that in granting review orders, the Courts are guided by the three key elements or review as provided **Order 45 Rule 1 CPR** and as was established in the case of ***Nasibwa Wakenya Moses vs University of Nairobi & Another [2019]eKLR***, where Mativo J. when quoting the decision in ***Ajir Kumar Rath vs State of Orisa & 9 Others Supreme Court cases 596 a page 608***, stated;

> ***"The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced but him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason… It may be pointed out that the expression "any other sufficient reason…. Means a reason sufficiently analogous to those specified in the rule"***

The Applicant submitted that at the time of filing the initial application, the Defendant/Respondent had not issued any Statutory Notice in the

prescribed format calling for the payment and/or rectification of any default. Whatever was placed before court were imminent threats in form of Demand Letters seeking payment of outstanding amounts in full out of the loan disbursed to the Plaintiff.

These demands were coupled with unsubstantiated claims in terms of figures and interests accrued and were never supported with any evidence from the Defendant as to any default on the Plaintiff/Applicant's part. In addition, it is worth noting that the Plaintiff Applicant had religiously repaid the loan accounts as and when they fell due without any default up until the Defendant started making the unsubstantiated claims as to the accounts being in arrears.

During the pendency of the application, however, the Defendant/Respondent went ahead and issued Statutory Notice dated 26th September 2019 and served upon the Plaintiff/Applicant on14th November 2019 calling for the immediate rectification of such default plus interests, failure to which it would exercise its rights as to recovery of the full amount. The Notice was never brought to the attention of the court before the ruling dismissing the application for temporary Injunction. The Defendant however, in its part knew about the impending notice and never bothered to inform the court nor the Applicant despite the Notice having been drawn earlier during the pendency of the application.

The Applicant submitted that it is upon this Statutory Notice that it has now approached this Court seeking a review of the orders the Court made dismissing the application. That in sending the Statutory Notice, the Defendant displayed its high handedness in the manner it held and handled the Loan account of the Plaintiff/Applicant in that in making the initial demands, the same were to threaten the Plaintiff and push it into default by making unsubstantiated claims and thereafter send formal notices with the sole aim of dispossessing it of its properties.

In the case of ***Arthur Kiprono Korir versus County Government of Kericho [2017]eKLR***, the Court in granting a review of its judgment noted that the Respondent had deliberately withheld crucial material records that would assist the Applicant effectively establish his case against it.

Further, in the case of ***Salesio Njeru Mbogo & 112 Others vs Kenya Planters Cooperative Union [2017]eKLR,*** the Court in granting an Order for review of where it was established that the Respondent as the employer had the knowledge, custody and information relevant to the status of the suit but withheld the said information. It was held that to fail to do so and act in a manner so as to steal a match against the petitioners as it were amounted to acting in bad faith and the application herein by the petitioners was found to be justified on the face of the new matters, evidence and records.

Whether the Applicant is likely to suffer irreparable harm if he Review Orders are not granted?

The Applicant submitted that it was deserving of the Review Orders in the circumstances, irreparable harm is likely to occur to it if the said intended exercise of Statutory Power of sale is to proceed as planned. That there is likelihood of the Defendant moving to issue the Notice to sell and further instruct an Auctioneer to issue the Redemption Notice with the sole aim of defeating the interests of the Plaintiff/Applicant. In moving forward with the sale, albeit illegal, they would be relying under the provisions of **Section 99(4) of the Land Act** which provides that;

> ***"a person prejudiced by an unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."***

It was Applicant's submission that the intended exercise if the power of sale arises out of blatant breach of the law, to which breach is yet to be determined at the trial of the main suit where evidence will be adduced and the same tested through the rigorous trial process. It is upon this basis that the Plaintiff/Applicant pray for the grant of interim injunction pending the hearing and determination of the main suit. This similar position was adopted by Warsame J. in the case of ***Joseph Siro Mosioma vs Housing Finance Company of Kenya Ltd & 3 Others (2008) eKLR*** where he held that;

> ***"…damages were not an automatic remedy when deciding whether or not to grant an injunction and that the same could not be a substitute for loss occasioned by a clear breach of the law."***

In the case of Muiri Coffee ***Estate Limited vs Kenya Commercial Bank [2009] eKLR***, Khaminwa J. (as he then was) quoting from the decision of Ringera J. (as he then was) in the case of ***Lucy Njoki Waithaka vs ICDC*** also observed as follows;

> ***"It is not an inoxerable rule that where damages may be an appropriate remedy an interlocutory injunction should never be granted. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespassers. It would be unjust and be seen to be unjust."***

RESPONDENT/DEFENDANT'S SUBMISSIONS

The Respondent/Defendant in its submissions relied in the case ***SheilaAkinyi Marco & 2 Others vs Sasanet Ltd & 3 Others [2009]eKLR*** Kimaru J. when considering an application for review on similar grounds to the ones in the present case held:

> ***"For an applicant to succeed in an application to review a decision of the court on the ground of discovery of new evidence, he must establish that he had made discovery of the new and important evidence that after the exercise of due diligence was not within his knowledge or could not be produced by him at the time the order was made (Touring Cars (K) Ltd vs Munkanji[2001]1EA 261.)***

The Respondent submitted that this court having made a finding that the Respondent was within its rights to proceed to exercise its statutory

power of sale under **section 90(1) of the Land Act**, the Applicant cannot argue that the issue of a notice under **section 90 of the Land Act** is new and material evidence that could lead this court to reach a different decision than the one it did so as to warrant a review of this court's decision.

The decisions in ***Arthur Kiprono Kori vs County Governemnt of Kericho (supra)*** and ***Salesio Njeru Mbogo & 112 Others vs Kenya Planters Cooperative Union (supra)*** are distinguishable from the present proceedings as they involve instances where a party had knowledge, custody and information relevant to the status of the suit but withheld the information. In the present proceedings, the defendant did not withhold any information and this Court held that the defendant was within its rights to issue the notice under section 90 of the Land Act.

In ***Nakuru Industries Limited vs Sirbrook (K) limited [2017]eKLR*** the Court of Appeal stated;

> ***"A litigant who has a right of appeal but has not appealed or who has no right of appeal but who desires to seek review of the order or decree with which he is aggrieved must bring himself within the parameters of rule 1(1) of Order 45. In the instant case, the matters stated by the appellant as the basis of the review sought before the learned Judge fell outside the ambit of rule1(1) (supra). They also could not constitute "any other sufficient reason" as they were clearly grievances appertaining to alleged errors by the learned Judge in his decision. That is the stuff expected in an appeal and not in a review. It would be awkward for a judicial officer to be required to sit and listen to submissions and arguments as to why his decision is wrong or erroneous. That would be tantamount to asking the court to sit on appeal on its own decision. (emphasis added)"***

In ***Sheila Akinyi Marco (supra***) Kimaru J. held;

> ***"I am of the view that the arguments presented to this court by the Plaintiffs are actually a rehash of the arguments that they presented to the court when they argued the initial application that is the subject of this application for review. I think, with the greatest respect to learned counsel for the Plaintiffs, the Plaintiffs are seeking to have a second bite of the cherry. In essence, the Plaintiffs appear to be calling upon this court to sit on appeal against its own decision. That cannot be. The grounds presented to this court by the Plaintiffs are not new and important evidence that would this court to reach a different decision other than the one it reached" (emphasis added)***

In ***Nakuru Industries Limited (supra)*** the court of Appeal cited with **approval Chittaley & Rao on the Code of Civil Procedure (4th Edn), Vol 3, page 3227** which states;

> ***"A point which may be a good ground of appeal may not be a good ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for appeal and not for review."***

DETERMINATION

> **The Court considered pleadings and submissions by Counsel and the issue for determination is whether the Court should review the Ruling of 22nd November 2019 or not.**

The Plaintiff/Applicant's case for review of this Court's Ruling of 22nd November 2019 is as follows;

The Defendant sanctioned in 2011, 5 facilities with guarantees and executed 4 charges over the suit properties for Ksh 335,182,620/-

The Plaintiff serviced the loans /facilities and were not in arrears whatsoever prior to filing of the suit in 2016.

As a result of mismanagement of the Plaintiffs Accounts, they had a sit down to obtain explanations over the loan account which ended with the Defendant sending demands for payment of staggering sum of Ksh 456,677,508.40/-

The Applicant stated that the said sum of Ksh 456,677,508.40 was grossly inflated, totally outrageous, obnoxious and further the process or procedure leading to the arrival of this amount is shrouded in mystery as the calculations used to calculate the same was not known to the Applicants neither is it founded on the terms of the Loan Agreement let alone registered Charge documents. The Bank statements filed by the Bank itself also show a different amount as well.

With regard to the astronomical figure of Ksh 456,677,508.40 due to arbitrary inflated interest rates without notice of increase of interest to the Plaintiff, the same issue was raised in the application of 21st November 2016. This Court stated as follows;

> ***The issue of interest is raised; the issue can only be resolved by the terms of the contract(s) by the parties. The Court can only intervene if the Plaintiff demonstrates by particularizing what interest was imposed unlawfully or irregularly and at what point contrary to the law. The law provides, that it would not by and of itself halt the Chargee's lawfulright in exercise of statutory power of sale as provided in Section 44 & 52 of Banking Act. The Principal amount due and owing as at 22nd August2016 is Ksh 431,080,643.99 and interest Ksh 25,596.864/-. So even if interest is contested, the principal amount of 5 facilities remains due and owing.***

The Court cannot legally rewrite terms of the Contract(s). If the Plaintiff contested arbitrary interest rates imposed on the loan facilities the loan/charge documents would have been annexed/produced to confirm rates of interest contracted by parties and would have aided his claim,

by determining the interest rates agreed on in the said contracts.

Thereafter, any inflated, illegal and irregular interest would be clearly determined at the Trial. In the case of ***Margaret Njeri Muiruri vs Bank of Baroda (KY) Ltd [2014] eKLR*****,** the Defendant bank would confirm if the rate of interest is as per the loan/charge documents executed by parties and in compliance with **Section 44 of the Banking Act.** These loan agreements though filed, they were not referred to and the specific interest rates identified during the hearing of the application of 21st November 2016. Secondly, the Applicant has not disclosed what was paid to the Respondent in servicing the facilities**.** Although the charges and loan documents were annexed to the Defendant's bundle filed on 6th September 2017, the increased interest contrary to the contract was not disclosed. This Court cannot at this stage reconsider the issue of interest as it would amount to sitting on appeal of its decision.

The main thrust of the instant application is that the defendant bank, as per the Applicant's submission, subsequent to filing of this suit in Court and during the pendency of the determination, the Defendant through its agents who were aware of the pending suit in Court wrote/served the Applicant with Statutory Notice dated 26th September 2019 on 14th November 2019 requiring compliance within the specified period, failure to which, the Defendant would exercise its remedies as contained in the Charge document. Marked **JKG -001** is a copy of the said Statutory Notice.

The Applicant averred that at the time of dismissing the application for having not established a *prima facie* case to warrant the grant of Temporary Injunction, this Court's attention had not been made aware of the service or existence of the Statutory Notice.

Therefore, it is upon this basis that the Applicant is approaching the Court to review its decision dismissing the Plaintiff's application for Temporary Injunction pending hearing of the main suit in order to preserve the suit Properties pending hearing.

The Applicant stated that if these orders are not granted the Applicant will suffer irreparable loss and damages since all its life time investments worth millions of shillings are in the suit properties since the bank would proceed to auction the property yet even during the pendency of the suit, one property was sold by private treaty and all the amount of Ksh 50,000,000/- given to the bank for which credit has not been given.

The Applicant intimated that at the time of filing the initial application, the Defendant/Respondent had not issued any statutory notice in the prescribed format calling for payment and/or rectification of any default.

The Applicant relied on **Order 45 Rule 1 CPR 2010** on the basis of discovery of new and important matter or evidence which, after exercise of due diligence was not within the Plaintiff's knowledge or could not be produced at the time of hearing and determination of the application filed on 21st November 2016.

Marked **JKG -001** is a copy of the said Statutory Notice of 26th September 2019 and served on 14th November 2019 referenced **2nd Statutory Notice under Section 90 of the Land Act 2012** and was to expire on 14th February 2020 for suit properties Uasin Gishu/Mile 13/Scheme3, South Ugenya/Nyiro/2835 and LR 209/136/65.

The Notice outlines;

a) A charge dated 8th April 2011

b) Further Charge10th October 2011 combined Ksh 350,000,000

c) A charge of 2nd April 2015 for Ksh 70,000,000

d) A charge of 13th April 2015 for Ksh 201,000,000

The Statutory Notice outlines the Overdraft and 4 Loan accounts with the Current principal amounts and accrued Interest and Interest Rate Central Bank Reference **Rate 9% plus 4% p.a.**

The Plaintiff Applicant filed suit on 21st November 2016 and an application, Notice of Motion under certificate of urgency of the same date and sought temporary injunction.

Contrary to the Plaintiff/Applicant's assertion that it had not been served with any statutory notice, the Defendant issued 3-month notice on 22nd August 2016.

On 16th January 2017, the parties entered Consent before Hon. Onguto J to resolve the matter amicably and after negotiations record consent. The application was canvassed on12th June 2019 and Ruling delivered on 22nd November 2019, the Court found that a prima facie case had not been established to warrant grant of temporary injunction pending hearing of the suit.

From these facts, the 2nd Statutory Notice of 26th September 2019 served on 14th November 2019 was served while the application was pending Ruling of the Court. Therefore, it could not be termed a discovery of new facts as the service was not done before the application was heard.

On the issue that it was served during the pendency of the hearing and determination of the application and/or suit; the Defendant deponed

that the Court did not issue any interim orders of injunction, maintenance of status quo or stay of execution. I have perused the Court File and found that interim orders were not granted.

The Defendant also submitted that the issuance of the 2nd statutory notice would not affect the substance of the application as the parties addressed the Court through Counsel and the same was pending Ruling.

However, this Court considered as follows; that the statutory period begun running before the decision of the Court was rendered. The statutory period commenced on 14th November 2019 while the Court Ruling was delivered on 22nd November 2019. Ideally, the Statutory Notice would commence/issue after the Court Ruling of 22nd November 2019. So the issuance of the statutory notice before outcome of the application filed by the Applicant and awaiting the Ruling; prejudiced the Plaintiff who was waiting for the Decision of the Court only to be saddled with a 2nd statutory notice before then. Supposing the statutory period lapsed before the Ruling of the Court was delivered, would the statutory power of sale have been legally effected? The matter would have been subject of litigation at great cost and time. Apart from timelines, the statutory notice is valid and legal in default of Plaintiff repayment of at least the principal amount due and owing. The Plaintiff has not settled the principal sum and did not inform the Court how much has been paid pending hearing on the interest.

DISPOSITION

1. The application for review of the Court Ruling of 22nd November 2019 is dismissed with costs.

2. The Statutory Notice of 26th September 2019 was issued on 4th November 2019 before Ruling of the Court on 22nd November 2019.

3. The Application of 3rd February 2020 is partly upheld and partly dismissed.

4. To avert any prejudice to the Plaintiff, the statutory notice though valid shall run for 90 days from today.

5. The Plaintiff/Applicant to pursue payment/settlement of the principal sum of loan/overdraft/facility advanced by the Defendant pending hearing of the suit.

DELIVERED SIGNED & DATED IN OPEN COURT ON 26TH JANUARY 2021(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. OMONDI H/B MR. GACHIE FOR THE APPLICANT

MR. ONDIEKI FOR THE RESPONDENT

COURT ASSISTANT: TUPET