IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E260 OF 2020

BETWEEN

KENLINK GLOBAL LIMITED .....1ST PLAINTIFF

WINFRED KABURU KINYUA.....2ND PLAINTIFF

YOLETS AGENCIES LIMITED .....3RD PLAINTIFF

AND

PARAMOUNT UNIVERSAL BANK LIMITED .....DEFENDANT

RULING

Introduction and Background

1. The Plaintiffs have approached the Court by a Plaint accompanied by a Notice of Motion Application dated 20th July 2020 made, inter alia, under **Order 40 Rule 1** of the ***Civil Procedure Rules*** seeking, *inter alia*, an injunction restraining the Respondent ("the Bank") from selling or otherwise dealing with the properties known as Flat No. 2E on LR No. 5/44 Nairobi("the Maruti Flat") in the name of the 2nd Plaintiff and Unit No. 4 on LR No. 5/153 Nairobi("Jipe Villas") in the name of the 1st Plaintiff ("the suit properties") pending the hearing and determination of the suit.

2. The application is supported by the affidavits of Winfred Kaburu Kinyua, the 2nd Plaintiff and a Director of the 1st and 3rd Plaintiff Companies, sworn on 20th July 2020 and 12th October 2020 respectively. There is also an affidavit of Yvonne Nyawira Kinyua, a Director of the 1st and 3rd Plaintiffs, sworn on 2nd October 2020. The application is opposed by the Bank through the replying affidavit sworn on 25th August 2020 and an undated further affidavit sworn by Timothy Kimani, its Legal Consultant. The application was canvassed by brief oral highlights of the written submissions by the parties' advocates. Since there are disputed facts, I shall set out the parties' respective positions.

The Plaintiffs' Case

3. The facts in support of the application as set out in the deposition of Winfred Kaburu Kinyua are as follows. By a Letter of Offer dated 12th March 2020, the Bank offered them combined banking facilities amounting to Kshs. 31,000,000.00 on account of Letters of Credit to import medical disposables and overdraft facilities to expand their business. The facilities were secured by inter alia, the existing First Legal Charge over the Maruti Flat as a continuing security, a First Legal Charge over Jipe Villas and directors personal guarantees.

4. The facilities were renewed by a Letter of Offer dated 4th September 2011 under which the Plaintiffs were granted overdrafts to supplement working capital as follows; the 1st Plaintiff Kshs. 11,000,000.00, the 2nd Plaintiff Kshs. 20,000,000.00 and the 3rd Plaintiff Kshs. 200,000.00. The facilities were secured by, *inter alia*, the existing charges over the suit properties.

5. The Plaintiffs claim that they serviced both facilities consistently but noticed that the Bank had demanded Kshs. 109,288,720.00 which was irregular and unknown to them. In addition, the Plaintiffs state that the Bank, through its advocates, *Mwaniki Gachoka and Company*, issued a statutory notice to the 1st and 2nd Plaintiffs demanding Kshs. 30,199,859.09 to be paid within three months in default of which it would proceed to sell the suit properties. The Bank, through its advocates, issued another statutory notice dated 14th February 2020, demanding Kshs. 6,380,230.79 to be paid within three months otherwise it would proceed to sell the Maruti Flat.

6. The Plaintiffs state that the Bank has taken possession of the Maruti Flat and leased it out. They complain that the Bank has not adjusted accounts to reflect the proper figures owed and has refused to account for rental income accrued from the Maruti Flat. The Plaintiffs depone that the suit properties are prime and valuation of the Maruti Flat indicates that it was valued at Kshs. 10,000,000.00 in 2008 while Jipe Villas was valued at Kshs. 60,000,000.00 in 2013 which values have increased to date.

7. The Plaintiffs case is that they have learnt that the Bank intends to sell the suit properties and yet the Bank has never issued all the other requisite statutory notices. They submit that unless the court intervenes, the Bank will illegally dispose of the suit properties to third parties to their detriment occasioning them irreparable loss.

The Bank's Case

8. The Bank's case is that the Plaintiffs comprises misrepresentation and distortion of facts. It confirms that it advanced to the Plaintiffs banking facilities as per the Letters of Offer dated 12th March 2010 and 4th September 2011, disbursed funds in accordance therewith and when the Plaintiffs defaulted in making payment, proceeded to issue statutory notices in order to exercise its statutory power of sale in accordance with **section 90** of the ***Land Act***.

9. The Bank states that when it issued the statutory notices upon default by the Plaintiffs, they approached it for negotiations. Following successful negotiations, the Bank, 1st and 2nd Plaintiffs entered into a Settlement Agreement dated 4th December 2018 ("the Settlement Agreement") whose effect was as follows:

§ Jipe Villas would be sold by way of private treaty to offset all the outstanding loan amounts

§ The Bank would in turn release the original certificate of lease in respect of the Maruti Flat.

10. In fulfilment of the Settlement Agreement, the Plaintiffs executed a transfer of Jipe Villa dated 5th June 2019 in favour of Topaz Grey Ventures Limited for Kshs. 55,000,000.00 while the Bank executed a Discharge of Charge dated 24th May 2019 in respect of the Maruti Flat and released the original certificate of lease to the 2nd Plaintiff.

11. Thereafter, the 2nd Plaintiff's son, Roy Gitonga Kaburu, approached the Bank for facilities. The Bank offered him a term loan of Kshs. 6,000,000.00 as evidenced by the Letter of Offer dated 17th December 2019. The facility was to be secured by, inter alia, a First Legal Charge dated 24th May 2020 over the Maruti flat. The Bank contends that Roy Gitonga Kaburu defaulted in repaying the loan vide causing the Bank to issue statutory notices under **sections 90** and **96** of the ***Land Act*** in exercise of its power of sale.

The Plaintiffs' Response

12. In response to the Bank's deposition, the Plaintiffs state that when they received the statutory notice dated 9th July 2018, they engaged the Bank in negotiations as they had disputed the figures therein. That they agreed that the 2nd Plaintiff would move out of Jipe Villas and the Bank would lease it out at a monthly rent of Kshs. 250,000.00 which would assist in offsetting the loan. She therefore surrendered the property to the Bank.

13. The 2nd Plaintiff denies that she executed the Settlement Agreement. She states that the Bank presented her a draft agreement which she refused to execute. The Plaintiffs also impeach the credibility and validity of the Settlement Agreement stating that neither the 2nd Plaintiff nor Yvonne Nyawira executed the Settlement Agreement before Ms Maureen Wambui Kibatia as indicated on its face. The Plaintiff adds that the Settlement Agreement was neither stamped for duty nor registered as required by law.

14. The Plaintiffs also contest the validity and legality of the Transfer of Lease to Topaz Grey Ventures Limited. They contend that the Transfer was neither executed by the 2nd Plaintiff or Yvonne Nyawira in the presence of Maureen Wambui Kibatia as indicated on the face of it. They also maintain that the Transfer is not accompanied by the 1st Plaintiff's directors' resolution and that the consideration of Kshs. 55,000,000.00 is not reflected in the statements provided by the Bank. As a result of these issues, the Plaintiffs state that they have since made a request to the Directorate of Criminal Investigations to investigate the fraudulent transfer of Jipe Villas.

15. The Plaintiffs depone that the inconsistency between the amounts demanded in the statutory notice and the amounts purported to be owed in the Settlement Agreement raises further suspicion on the legality of the transaction the Bank claims the 1st and 2nd Plaintiffs consented to. The Plaintiffs add that it was inconsistent with the Bank's records for them to settle the disputed debt of Kshs. 109,388,720.00 with the transfer of the property for a consideration of Kshs. 55,000,000.00.

16. The Plaintiffs state that the Bank accepted to lend the 2nd Plaintiff an additional Kshs. 6,000,000.00 to cater for renovations of Jipe Villas but that the said loan was to be paid by the 2nd Plaintiff in 54 monthly installments of Kshs. 147,346.00 expiring on 30th June 2022. The Plaintiffs further state that loan was disbursed to the 2nd Plaintiff's son, Roy Gitonga Kaburu's account after she was advised that the Central Bank would not allow her to receive additional funds from the Bank before clearing the preceding loan.

17. The Plaintiffs deponed that the Statement of Accounts provided by the Bank for account number 0100036**** held by Roy Gitonga Kaburu is neither true, sufficient nor admissible in line with **section 176** of the ***Evidence Act*** and that it is misleading for the Bank to state that this is the only bank account held by Roy Gitonga Kaburu adding that there are three other accounts relating to the facilities.

18. The Plaintiffs submit that they are not indebted to the Bank to the extent claimed. They contend that the facility period has not fallen due for the Bank to the exercise of the statutory power of sale.

Analysis and Determination

19. The principles upon which the court is required to apply in determining the Plaintiffs' case are common ground. In ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, the Court of Appeal reiterated the settled principles in ***Giella v Cassman Brown*** **[1973] EA 358** as follows:

> *In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*
>
> *(a) establish his case only at a prima facie level,*
>
> *(b) demonstrate irreparable injury if a temporary injunction is not granted, and*
>
> *(c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.*
>
> *These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.*

20. As to what constitutes a prima facie case, the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others*** **MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR** explained that it is, *"a case in 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 to call for an explanation or rebuttal from the latter."* From the pleadings and depositions, the Plaintiffs seek to protect the suit properties by an injunction restraining the Bank exercising its statutory power of sale.

21. From the outline of facts, I have given, it is not in doubt that the Bank advanced the Plaintiffs two banking facilities as evidenced by the Letters of Offer dated 12th March 2010 and 4th September 2011. The point of departure is the third facility which the Bank advanced to the 2nd Plaintiff's son, Roy Gitonga Kaburu, as evidenced by the Letter of Offer dated 17th December 2018. The Plaintiffs contest the Bank's assertion that the first two facilities were settled under the Settlement Agreement. They contend that Jipe Villas was sold fraudulently.

22. As regards Jipe Villas, there is clear evidence that it was sold pursuant to the Transfer of Lease dated 5th June 2019 in favour of Topaz Grey Ventures Limited pursuant to the Settlement Agreement. In as much as the Plaintiffs allege fraud and this will be a matter for trial, the uncontested evidence is that Jipe Villas has already been transferred to a third party. Neither the 1st Plaintiff nor the Bank have a proprietary interest in that property. Since the property has been transferred to a third party, who is not party to this suit, the court cannot even issue an injunction let alone proceed to make any determination affecting the property without hearing the third party (see ***Pashito Holdings and Another v Paul Nderitu Ndung'u and 2 Others*** **NRB CA Civil 198 of 1997 [1997] eKLR**). In this respect therefore, the Plaintiffs do not have a prima facie case with a probability of success regarding the Jipe Villas.

23. Turning to the Maruti Flat, when the Plaintiffs filed the Notice of Motion, they did not disclose that the 2nd Plaintiff's son had been advanced Kshs. 6,000,000.00 on the security of the said flat as clearly evidenced by the First Legal Charge dated 24th May 2019. Their case was that there were two facilities in existence. This in my view constitutes non-disclosure of material facts which would disentitle the Plaintiffs to equitable relief (see ***Owners of the Motor Vessel "Lillian S" v Caltex Oil Kenya Limited*** **[1989] KLR 1**). The 2nd Plaintiff, in her subsequent deposition, however, admitted the fact that the Bank made additional advances purportedly for settling costs of renovation. I say purportedly, because the only evidence of those advances is the Letter of Offer dated 17th December 2018 lending Roy Gitonga Kaburu Kshs. 6,000,000.00 to enable him purchase a property and the charge executed by the 2nd Plaintiff and her son. The Plaintiffs did not provide contrary evidence.

24. It is in respect of the indebtedness of Roy Gitonga Kaburu, that the Bank seeks to exercise its statutory power of sale in respect of the Maruti Flat. Contrary to the assertions by the Plaintiffs, all previous facilities were compromised under the Settlement Agreement. This is why the 2nd Plaintiff was able to execute the First Legal Charge dated 24th May 2019. It would not have been possible to do so if the previous security was still in existence. There is also no evidence to show that the Bank is seeking to revive any claims which it considered compromised under the Settlement Agreement by making demands thereunder.

25. The Bank has provided a statement of account of the borrower, Roy Gitonga Kaburu, running from 19th February 2019 to 4th September 2020. Out of the total loan amount, the borrower erratically paid Kshs. 944,756.15 only. As at 4th September 2020, he owed the Bank Kshs. 6,880,671.15 which is still accruing interest. The statement of account produced by the Bank is covered by **section 176** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** which creates a presumption in favour of the Bank as follows:

> *176. A copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.*

26. While the Plaintiffs submit that this statement of account is neither true, sufficient nor admissible in line with **section 176** of the ***Evidence Act***, they have not explained or rebutted what is untrue, insufficient or inadmissible about the said statement by adducing any other evidence to show for example, that the borrower paid instalments of Kshs. 147,346.00 per month either through cash deposits, cheques, direct debit or RTGS as required under the terms of the Letter of Offer dated 17th December 2018. In the absence of any evidence to the contrary, I find that the statement furnished by the Bank reflects the borrower's debt position. I do not find any reason to order the furnishing of any other statements as prayed in the Notice of Motion.

27. As regards the accounts in respect of the two earlier facilities which the Bank contends were compromised by the Settlement Agreement,

the proper cause would be to await determination whether it is vitiated by the fraud alleged by the Plaintiffs. At any rate, the general principle is that the court will not issue an injunction to restrain a chargee from exercising the statutory power of sale on account of a dispute as to the loan amount and/or interest owed (see ***Desai and Others v Fina Bank Limited*** **[2004] 2 EA 46** and ***Air Travel & Related Studies Ltd v Equity Bank (Kenya) Ltd*** **[2017] eKLR**).

28. Following the borrower's indebtedness, the Bank issued a statutory notice dated 14th February 2020 under **section 90** of the ***Land Act*** and sent it to the borrower and 2nd Plaintiff by registered post as evidenced by the certificate of posting. It issued a further statutory notice dated 28th May 2020 under **section 96** of the ***Land Act*** and dispatched it to the borrower and 2nd Plaintiff by registered post as evidenced by the certificate of posting. Before selling the charged property, the Bank is required under **section 97** of the ***Land Act*** to undertake a forced sale valuation of the property. The Bank is yet to take steps to sell the charged property hence it is premature, as the Plaintiffs seek in the Notice of Motion, to direct the Bank to conduct an independent valuation of the Maruti Flat. Besides, the Plaintiffs have not shown the Bank has acted irregularly, unlawfully or illegally in the manner it has invoked the process of exercising its statutory power of sale.

29. I am aware that at this stage I am not required to make conclusive findings of fact but the totality of the evidence is that the borrower, Roy Gitonga Kaburu, remains indebted to the Bank. The Bank has now issued the statutory notices to the 2nd Plaintiff. The Bank's statutory power of sale in respect of the Maruti Flat has now accrued. The Plaintiffs have not established any basis for the court to stop the Bank from exercising its statutory power of sale. They have failed to establish a prima facie case with a probability of success. Following the *dicta* in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **(Supra)**, once an applicant fails to establish a prima facie case with a probability of success, the court need not proceed to consider the other grounds.

Disposition

30. I now dismiss the Notice of Motion dated 20th July 2020 with costs to the Defendant.

DATED and **DELIVERED** at **NAIROBI** this **21st day of JANUARY 2021.**

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Onyango instructed by Chepkuto Advocates for the Plaintiffs.

Mr Mumia instructed by Mwaniki Gachoka and Company Advocates for the Defendant.