REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E505 OF 2020

KUMKANG KIND COMPANY LTD.....PLAINTIFF

- VERSUS -

HOMEX HOUSING LIMITED.....1ST DEFENDANT

ROBSON HARRIS & COMPANY ADVOCATES.....2ND DEFENDANT

R U L I N G

1. This is a ruling on the plaintiff's Notice of Motion dated 20/11/2020 brought under ***Order 40 Rules 1 and 4 and Order 51 Rule 1 of the Civil Procedure Rules*** *and* ***section 63 of the Civil Procedure Act.***

2. The application sought for a temporary injunction and a conservatory order restraining and/or barring the defendants from alienating or otherwise dealing in any manner whatsoever with four apartments known as Apartment C1, C2, C3, C4 erected on **Title Number Kiambaa/Thimbigua/2389** ("the suit property") pending the hearing and determination of the suit.

3. Further, it sought an order that the 1st defendant do deposit in court a sum of USD 186,876/28, being the amount due and owing from the 1st defendant to the plaintiff or in the alternative, the 2nd defendant be compelled to specifically perform the terms of the Loan Agreement dated 31/12/2017 by yielding up the Leases for enforcement of the 1st defendant's security.

4. The grounds upon which the application was predicated on were set out in the body of the Motion and the supporting affidavit of **Sang Won Jeon** sworn on 4/5/2020. These were that; by a Loan Agreement made on 31/12/2017("the loan agreement") between the plaintiff and 1st defendant, it was agreed between the parties that the plaintiff would lend the 1st defendant a sum of US $ 198,876/28 ('the loan") for the purchase one set of Kumkang Aluminum Formwork equipment from the plaintiff.

5. The security for the loan was 4 apartments identified as **C1, C2, C3 and C4** ("the apartments") erected on the suit property. The 1st defendant pledged the apartments by executing an Agreement for sale and Leases in respect of the apartments. The Agreement for sale and Leases for the apartments were to be held in escrow by the 2nd defendant until the loan was repaid in full. They were to be released for registration in the event of default by the 1st defendant.

6. The plaintiff contended that while it carried out its part of the obligations under the Loan Agreement by supplying the 1st defendant with the Aluminum Formwork, the latter failed to repay the loan within 240 days of the date of the Bill of Lading which was on 28/06/2018 or at all. The 1st defendant has only paid a sum of US$ 30,000/- leaving an outstanding sum of US$ 168,876/28.

7. It was further contended that the 1st and 2nd defendant have since breached the Loan Agreement in that; the 2nd defendant has refused to release to the plaintiff the Agreement for sale and Leases for the apartments for registration while the 1st defendant, who has defaulted in repaying the loan, has charged the apartments to Eco Bank Kenya Limited to secure a loan of Kshs. 30,000,000/-.

8. The application was opposed by both defendants. The 1st defendant opposed the application vide a replying affidavit of **Samuel Njoroge** sworn on 14/12/2020. It contended that it had faced significant economic challenges due to the current crash in the property market. This had led to negotiation and restructuring of a loan facility with Ecobank Limited in order to forestall the auctioning of one of its projects. The bank then demanded that the apartments be pledged as collateral for the additional facility of Kshs. 30,000,000/-.

9. The 1st defendant further contended that at the time of pledging the apartments to Ecobank Limited, it had not created any Leases with the plaintiff. That on 4/8/2020, the parties agreed on a repayment plan with alternative securities which were of a higher value than the

outstanding amount. The 1st defendant was therefore surprised with the filing of the current suit as the parties had already agreed on a repayment mode for the outstanding amount.

10. The 2nd defendant opposed the application vide a replying affidavit of **Benson Nyenjeri**, a partner at the 2nd defendant, sworn on 14/12/2020. He averred that the 2nd defendant only acted in their professional capacity as advocates representing the 1st defendant in the subject transaction. That they were neither a party to the said transaction nor did they represent the plaintiff.

11. That while the Leases to the apartments were to be held as security by the 2nd defendant, the same were never delivered to them by the 1st defendant. That in the premises, they are not in possession thereof and cannot be compelled to yield up them up.

12. In its supplementary affidavit sworn on 15/01/2021 in response to both defendant's replying affidavits, the plaintiff contended that, the Loan Agreement being firs in time, the apartments could not be available for further financial commitment without the plaintiff's consent. It denied any agreement allegedly for a new repayment plan with alternative securities. That the 2nd defendant owed the plaintiff a fiduciary duty of care.

13. The court has considered the record, the depositions of the parties and the submissions on record. This is an application for a temporary injunction. This is a discretionary remedy. Such discretion is judicial. As is always the case, judicial discretion has to be exercised on the basis of the law and evidence.

14. The principles applicable in an application for interlocutory injunction are well known. These were set out in the celebrated case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358.** These are that; an applicant must show a prima facie case with a probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm not adequately compensatable by an award of damages and that if the court is in doubt, it will decide the application on a balance of convenience.

15. A prima facie case was defined by the Court of Appeal in **Mrao Ltd v. First American Bank Ltd [2003] Eklr** to be a case where, on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party to call for an explanation by the latter.

16. The dispute between the parties arise out of a Loan Agreement entered into on 31/12/2017. It was for a sum of US$ 198,876/28 lent to the 1st defendant by the plaintiff. Paragraph 4.1 of the Loan Agreement provided: -

> ***"As security for the payment obligations of the Borrower in relation to the loan, the Borrower hereby pledges to the Lender four (4) apartments being apartment numbers C1, C2, C3 and C4 erected on Title Number Kiambaa/Thimbigua/2389 ("Homex Apartments")".***

17. Paragraph 4.2 stated: -

> ***"Accordingly, the Borrower shall simultaneously execute in favour of the Lender the Agreement for Sale and Leases for the said apartments. On the execution of this Agreement, the borrowers advocate shall hold the Agreement for Sale and Leases in escrow as Security until payment in full of the Loan Amount."***

18. While paragraph 7 therein stated: -

> ***"In the event of that the Borrower fails and/or defaults to pay the outstanding amount within the period agreed herein, the Lender shall:***
>
> ***i. Immediately and without further notice to the Borrower realize its Security by lodging the leases for registration on a pro rata basis"***

19. The Loan Agreement is not disputed. It provided that apartment **C1, C2, C3 and C4** in the suit property were given as security for the loan. That upon breach by the 1st defendant, the plaintiff would realize the security by lodging the Leases for registration. These Leases were to be held by the 2nd defendant in escrow.

20. The 1st defendant's answer is that the parties had since entered into a new repayment agreement with alternative securities. It produced a letter dated 1/9/2020 from the 2nd defendant to the plaintiff's advocates as evidence of that agreement.

21. The Court has carefully considered that letter. The letter proposed that the 1st defendant do settle the outstanding amount at Kshs.15 million by offering two properties. The repayment was to be concluded in or about 30/6/2022. There is no evidence that the proposals contained therein were accepted by the plaintiff. Accordingly, what is contained therein remained just that, a proposal. It cannot be held to be an agreement varying the Loan Agreement as is contended by the 1st defendant.

22. The answer by the 2nd defendant to the plaintiff's claim is that, it was not a party to the Loan Agreement. That it did not receive the Agreements for sale and the Leases. That in the premises, it is unsuited. This is in contradiction to the sworn statements of **Sang Won Jeon** in his supplementary affidavit of 15/1/2021. The latter stated that the 2nd defendant prepared the Agreement for sale and the subject leases.

23. The 2nd defendant cannot be said to be unsuited. It's the firm that prepared the Loan Agreement whose conditions were express that the said firm was to hold the Sale Agreements and Leases in escrow. The said firm also witnessed the execution of the Loan Agreement for both the parties. An issue arises whether the plaintiff was under free and independent legal advice. The 2nd defendant cannot seek to run from their responsibility. They should have sent the Plaintiff to their own advocates for independent legal advice.

24. How could the Loan Agreement be perfected and loan proceeds released by way of the subject equipment without the security therefore not yet perfected? On what basis was he loan released if not the duly executed Agreement for Sale and Leases? The position taken by the 2nd defendant, a reputable law firm, is difficult to understand. Unless there was a plan to defraud the plaintiff of the monies lent to the defendant.

25. In view of the foregoing, I am satisfied that the plaintiff has established a prima facie case with probability of success.

26. On whether the plaintiff will suffer irreparable loss, the debt of US$ 170,011.28 is not denied. The Court has found as a fact that the apartments were pledged as security for the loan. There has been default for approximately over 4 years now. The 1st defendant has since charged the same to Ecobank Ltd for other facilities.

27. The 1st defendant's act may not be said to be in good faith. The security for the plaintiff's loan is at stake in that a 3rd party has now created a right over the same security to the extent of Kshs. 30 million. There is no eveidence that the 1st defendant disclosed to Ecobank that the apartments had been pledged elsewhere,

28. In **Joseph Mbugua Gichanga v Co-operative of Kenya Ltd [2005] Eklr,** the court held: -

> ***"It appears to the court that the plaintiff has a strong case, like where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it."*** **(Emphasis provided)**

And ..

> ***"I have already found that the plaintiff has made out a prima facie case with a high probability of success. I therefore do not need to consider the issue whether or not damages can be an adequate remedy for the plaintiff. I grant the injunction in terms of prayer (b) of the application dated 4th November 2004 with costs to the plaintiff."***

29. This Court fully subscribes to the foregoing holding. The 1st defendant took the loan with no intention of repaying the same. It colluded with its advocates, the 2nd defendant to hoodwink the plaintiff that a firm security by way of Agreement for sale and Leases for the apartments had been created and held by the 2nd defendant in escrow. That the same would be available for registration upon default. The defendants now tell the plaintiff, *'sorry, the security is no longer available. We were not your advocates etc "*. That won't do.

30. One practical problem arises. Ecobank Limited already has rights and interest over the apartments. It has not been enjoined in these proceedings. However, I believe that they can be enjoined at an appropriate time. Their absence should not defeat the plaintiff's deserving claim. The plaintiff's claim was first in time, though unregistered, unlike that of Ecobank Ltd.

31. In the premises I find the plaintiff's application to be meritious. I allow the same in terms of prayer nos.3 and 5. The plaintiff will have costs of the application against both the defendants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2021

A. MABEYA, FCI Arb

JUDGE