REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

COMMERCIAL CASE NO. E348 OF 2020

KITHO CIVIL AND ENGINEERING COMPANY LIMITED....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT/RESPONDENT

RULING

1. By an application dated 13.2.2020 Kitho seeks orders that:

1. Spent.

2. Pending the hearing and determination of this application inter-partes the Bank by themselves, workmen or agents or otherwise whatsoever and whoever be restrained from carrying away, wasting, pledging, selling or any manner howsoever dealing with the following properties;

i) Title No. Nairobi/Block 26/160, Kileleshwa, Tabere Crescent,

ii) Apartment No. 1 on L.R. No. 330/1262 Nairobi Thomson Estate, Hatheru Road,

iii) Title No. Nzambani/Kyanika/158,677,678,890,1211,2511,2587 & 3180

iv) Kyangwthya/Mulundi/1972&1903,

v) Terrace No. 1, Massionate No. 3 erected on L.R. No. 205/62 (IR.61741) 84 Riverside Drive,

vi) Title No. Kitui Municipality Block 2/125 Kwa DC area, Kitui Town, and

vii) Title No. Kitui Municipality Block 3/379.

3. An order do issue that the Defendants forthwith withdraw the various notices to sell and/or auction of the properties listed in (2) above and halt any auction process pending the hearing and determination of this suit.

4. An order do issue to the Banks to stop debiting the Plaintiff/Applicant's account with transactions unknown to the contract and charging interest on the said entries.

5. It is in the interest of justice that the matter be heard urgently and an order do issue to restrain the Bank from the intended sale and/auction of the properties listed in (2) above until this application is heard inter-partes on such dates and at such time as this Honourable Court may direct.

6. ***The costs of this application be awarded to the Plaintiff/Applicant***.

2. The grounds upon which the Application is premised are that the Defendant/Respondent National Bank of Kenya (the Bank) issued the Applicant/Plaintiff **Kitho Civil and Engineering Company Limited** (Kitho) a 40 day notice dated 10.9.19, to sell/auction the properties listed in the application. According to Kitho, the notice is unlawful as it disregarded the existing relevant contractual obligations and legal procedures at the exposure of both parties in the event of a dispute. On 2.11.19 and 10.1.2020, the Bank caused valuation of the properties to be done. By a letter dated 6.2.2020, Keysian Auctioneers, with instructions from the Bank notified Kitho of the intention to auction the

properties. As a result of the Bank's actions, the tenants occupying the properties have threatened to vacate the same which will result in great financial loss to Kitho. Unless the orders sought herein are granted, Kitho is likely to suffer irreparable loss and damage.

3. The brief facts of the case are that on 30.5.17, Kitho was awarded a contract by the Kenya Rural Roads Authority (KeRRA) to upgrade to bitumen standard, the Matuu-Ekalakal-Kanguku and Junction A3 Katulani – Junction C439. At the request of Kitho, the Bank issued a performance bank guarantee to KeRRA in the sum of Kshs. 113,848,864. The Bank further extended an overdraft facility to Kitho in the sum of Kshs. 9,533,000/= to finance the contract.

4. Kitho claims that the Bank disbursed the funds in insufficient amounts and with delay, thereby occasioning constraints in mobilization and implementation of the project and delay in the construction works. Kitho applied to sub-contract 16 of the 40 kilometers in the contract, which was allowed by KeRRA on 28.5.19. Kitho then submitted a full programme of works to KeRRA on 17.10.19. However, on 22.10.19, KeRRA issued a notice to Kitho of termination of the contract, which notice was stayed by a Court order on 25.10.19. Kitho further claims that the Bank has, despite renewal of the guarantee and performance bond, continued to debit its account with the performance bond and interest thereon. Kitho contends that the intended sale of the properties is unlawful and laden with malice and should not be allowed by the Court.

5. The Bank opposed the Application asserting that it provided to Kitho, on its request, an unconditional and irrevocable advance payment guarantee (APG) for Kshs. 113,848,864 and an unconditional performance guarantee for Kshs. 56,924,432.05, both in favour of KeRRA and expiring on 5.2.21. The Bank also granted to Kitho an asset finance facility and invoice discounting facility in the sum of 79,000,000/=. These facilities were secured inter alia, by a first ranking debenture over the assets of Kitho, a first ranking charge over the properties herein and guarantees by the directors of Kitho. In October 2018, the Bank, extended to Kitho at its request, a temporary overdraft facility of Kshs. 9,533,000/= payable by 15.12.18.

6. The Bank asserts that despite being given extension and ample time to repay the amount owing, Kitho defaulted on the repayment of the facilities and has in fact never made any payment to the Bank since being granted the facilities. As at 8.11.19, the outstanding amounts on the facilities stood at Kshs. 190,900,173.20 and the escrow account had no funds. Further, since 2017 Kitho has not obtained any payment certificate from KeRRA on account of nonperformance of the contract. On 11.10.19, the Bank received letters from KeRRA calling in APG of Kshs. 113,848,864.10 and the performance guarantee of Kshs. 56,924,432.05 for default by Kitho on performance of the contract. The Bank is not privy to the contract between Kitho and KeRRA and is obligated to honour the guarantees, upon recall by KeRRA. Kitho obtained interim orders against the Bank in CMCC No. 8062 of 2019. The orders were however discharged and the suit dismissed for want of jurisdiction. To the Bank therefore, the suit and application herein are filed in bad faith and are an abuse of the Court process. Kitho has not met the threshold for grant of an injunction as set in Giella v CAssman Brown. As a result of the default and actions of Kitho, the Bank has incurred and continues to incur huge losses. The Bank urged the Court to dismiss the Application with costs.

7. Parties filed their written submissions which I have duly considered. The law on interlocutory injunction is stipulated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 while the principles for the grant of such injunction were well settled in the case of Giella vs Cassman Brown [1973] EA 358 where at page 360, Spry VP 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.***

8. On whether a *prima facie* case with a probability of success has been established, it was submitted for Kitho that the Bank seeks to auction the properties herein at illogically low prices and there is no valid valuation report to justify the said prices indicated in the auction notices. Kitho relied on the case of Yusuf Abdi Ali Co Ltd v Family Bank Limited [2015] eKLR.

9. In response, the Bank submitted that valuation of the properties was undertaken and that valuation reports of the Kitui properties were exhibited. The Bank further argued that Kitho has admitted in the supporting affidavit that valuation of the Nairobi properties was also done.

10. It is not disputed that Kitho is in defaulted. The Bank's right to exercise its statutory power of sale has accordingly arisen. Rule 11 of the Auctioneer Rules 1997 requires that valuation of properties to be sold in enforcement of securities by a charge, must be undertaken not more than 12 months prior to the proposed sale. The Land Act further requires that a forced sale valuation of a charged property must be undertaken before sale by a chargee. Section 97(2) provides:

> ***A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.***

11. The rationale of conducting valuation is to ensure that the best price is obtained at the sale and a chargee is under a duty of care to safeguard the interest of the chargor in this regard. This is the import of Section 97(1) of the Land Act which provides:

> ***A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.***

12. While the Court has seen the valuation reports of the Kitui properties, no such reports were availed for the Kileleshwa, Thompson Estate and Riverside Drive properties in Nairobi. In the absence of valuation reports, the only inference the Court can draw is that valuation for the 3 Nairobi properties was not undertaken. Clearly there was violation of Section 97(2) of the Land Act and Rule 11 of the Auctioneers Rules, 1997.

13. In the cited Yusuf Abdi case, the Court considered failure by the defendant therein to demonstrate valid valuation reports of the subject

properties. The Court found that the invalid the statutory notices could be regularized by the Defendant issuing fresh notices that strictly complied with the provisions of the law. The Court declined to grant the injunction sought therein. Similarly, in the present case, the non-compliance by the Bank with the law can be regularized by undertaking a forced sale valuation of the properties in compliance with the law. Having considered the foregoing, I am not persuaded that Kitho has established a *prima facie* case with probability of success.

14. Kitho further submitted that if the orders sought are not granted, it stands to suffer such loss as would not be adequately compensated by an award of damages. Kitho contends that one of the properties to be auctioned is the director's ancestral home; that other properties belong to innocent third parties who are strangers to the contract between the parties herein; that the reputation of Kitho and its directors is at stake; that the undervaluing of the properties and eviction from the properties and frustration of the contract will cause anxiety and distress to many individuals. To Kitho therefore, no compensation by way of damages would be adequate.

15. For the Bank, it was submitted that Kitho willingly charged its properties to the Bank to secure the guarantees and borrowings. The Bank contended that it was evident that Kitho is in default of payments and had not received any interim payment certificate from KeRRA since 1997 for non-performance of the contract. Further the Guarantees issued to KeRRA had been recalled and the law is that once the guarantees have been recalled, the Bank must strictly honour the same and pay on demand. Accordingly therefore, the Bank's statutory power of sale had arisen.

16. In all cases of secured loans, it is the borrower that decides on the properties to offer to the bank to secure the facilities granted. Similarly, in the present case, it was Kitho that offered the properties it did, to the Bank as security for the facilities extended to it, fully aware of the consequences of default. See the words of Ochieng, J. in the case of Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR:

> ***In a nutshell, sentimental attachment to the charged property should play no role in the matter. So that, if any person felt that he or his family attached great sentimental value to any property, he should never offer it as security.***

17. Every borrower who offers property as security to a lender for facilities granted confirms in the security documents that the terms of granting such security and the consequences of default have been explained to him. Further, a valuation of the property in monetary terms is undertaken to ascertain its adequacy as security for the facilities. No evidence has been placed before the Court that Kitho's case is any different. Kitho was fully aware of the import of offering the properties it did to the Bank and the consequences of default. The properties offered by Kitho to the Bank as security became a commodity for sale, in case of default. Ochieng, J. in the Andrew Muriuki Wanjohi case (supra) went on to state, and I concur:

> ***Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the chargee, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay it.***
>
> ***By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property.***

18. It bears repeating that a property offered as security becomes a commodity for sale in the event of default. Having defaulted in its obligations to the Bank, Kitho cannot now seek that the Bank be restrained from selling the properties, because one is the ancestral home of its director while others belong to third parties. In this regard, I am fortified by the holding in John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR where the Court of Appeal stated:

> ***A bank has no money of its own and it is axiomatic that it uses public funds to trade with. The applicant obtained a large amount of those funds and had full benefit of it. He offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents. He cannot be heard to say, as he does, that the securities are unique and special to him. We think the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capability has not been challenged.***

19. Where there is a clear case of default as in the present case, there can be no basis for restraining the Bank from exercising its statutory power of sale. In Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR, Kwach, JA had this to say on instances when a chargee may be restrained from exercising its statutory power of sale:

> ***The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-***
>
> ***"725 When mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.***

20. The Bank granted the facilities to Kitho on the strength of these securities. Kitho has not paid back even a single cent and owes in excess of 190,000,000/= as at 8.11.19. There is a clear case of default. Without paying what is claimed by the Bank, an injunction would not be justified. It has been stated time and again that Courts should not give succour to defaulters. Kwach, JA went on to say in the Mrao Ltd case

(supra):

> ***If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.***

21. Kitho has urged the Court to take the course which appears to carry the lower risk of injustice if it should turn out to be wrong as was stated by Ojwang, Ag, J (as he then was) in the case of Amir Suleiman v Amboseli Resort Limited [2004] eKLR:

> ***Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella v. Cassman Brown, the court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief* is denied*? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.***

22. In that case, Ojwang, Ag, J. went on to state that he was convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted. It must be noted that the facts in this case however, are that whatever harm that may be suffered, were the properties herein to be sold, the same would be remedied by an award of damages. The capability of the Bank to refund such sums as may be found due to Kitho, has not been challenged. By offering the properties as security, Kitho by extension offered the properties for sale in case of default. Now that default has occurred, it would be more unjust to prevent the Bank from recovering the amounts owed by selling the properties, noting that even lenders have their rights which must also be protected.

23. The grant of interlocutory injunction is discretionary. It is trite law that a party seeking this equitable relief must in all matters relating to the suit meet the approval of a Court of equity. The record shows that Kitho was granted ample time by the Bank to pay off the arrears owed. It is also noted that Kitho exhibited the letter from KeRRA dated 11.10.19 issuing notice of termination of contract, but conveniently omitted to mention that it had been issued notices dated 10.4.18 and 3.7.19 and meetings took place regarding the slow progress of the works. Kitho further failed to mention that in 23.5 months of the 30-month contractual period, it had only done 8.205% of the works. The Court also notes that no payment has been made to the Bank since the facilities were advanced. The filing of CMCC No. 8062 of 2019 and obtaining interim stay orders in a Court lacking pecuniary jurisdiction, is indicative of a party seeking to escape its obligations. In view of the foregoing, I am persuaded that Kitho has not come to this Court with clean hands. In this regard, I concur with and align myself with Njagi, J. in the case of Kyangavo v Kenya Commercial Bank Ltd & another [2004] eKLR where he stated:

> ***Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He cant have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently he has not done equity. In the hands of the plaintiff, a permanent injunction would wreck havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and charge have their own rights***.

24. It is common knowledge that banks the world over lend money to their customers with a view to profit. The Bank advanced the facilities to Kitho expecting a return on its investment. Kitho does not dispute its indebtedness to the Bank. Since getting the facilities in 2017 and 2018 however, Kitho has not paid a single cent towards redemption of the amounts advanced. The position therefore is that Kitho either pays the amount owed or allows the Bank to realize its securities. There are no 2 ways about it.

25. In the result and for the reasons stated, the Applicant has not demonstrated a prima facie case with a probability of success. Further, given the undisputed and admitted indebtedness of Kitho to the Bank, the balance of convenience tilts in favour of the Bank.

26. In the end and for the foregoing reasons, I do make the following orders:

i) Injunction is hereby issued in relation to Title No. Nairobi/Block 26/160, Kileleshwa, Tabere Crescent, Apartment No. 1 on L. R. No. 330/1262 Nairobi Thomson Estate, Hatheru Road, Terrace No. 1, Maisonette No. 3 erected on L. R. No. 205/62 (IR. 61741) 84 Riverside Drive, pending the compliance by the Bank with Section 97(2) of the Land Act and Rule 11 of the Auctioneers Rules, 1997.

ii) All other prayers are hereby denied.

iii) Given that the Bank failed to comply with the strict provisions of the Land Act as demonstrated herein, I direct that each party shall bear its own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF APRIL 2021

M. THANDE

JUDGE

In the presence of: -

..... for the Plaintiff/Applicant

..... for the Defendant/Respondent

.....Court Assistant