



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. E176 OF 2020**

**GEORGE GACHOHI CHEGE..... PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LIMITED .....1<sup>ST</sup> DEFENDANT**

**KEYSIAN AUCTIONEERS.....2<sup>ND</sup>DEFENDANT**

**R U L I N G**

1. Before me is a Motion on Notice amended on 27/11/2020. The same was brought under *sections 1A, 1B, 3A and 63(e) of the Civil Procedures Act (Cap 21); Order 40 Rule 1,2 and 4 and Order 51 of the Civil Procedure Rules, 2010.*
2. The Motion sought an order of injunction to restrain the respondents from advertising for sale, disposing off or in any way dealing with the properties known as **Title L.R Numbers Kajiado/Kaputiei-North/ 42357, 42359, 42360, 42361, 42362, 42363, 42364, 42365, 42366, 42367, 42368, 42369, 42370, 42371 & 42372** (hereinafter 'the suit properties') pending the hearing and determination of the suit.
3. Further, the applicant sought an order directing the 1<sup>st</sup> respondent to extend loan repayment as well as other restructuring arrangement before realizing its security and for the 1<sup>st</sup> respondent to remove the security personnel stationed at the suit properties. He further sought that there be an order directing joint marketing of the suit properties between him and the 1<sup>st</sup> respondent and the suspension of any accrual of interest during such exercise.
4. The applicants contended that; the applicant was afforded loan facilities totaling Kshs. 95,324,539/- by the respondent for the construction of 16 residential maisonettes. The suit properties were offered as security. According to the Letter of Offer dated 21/5/2012, interest was only payable once the full disbursement of the loan facility had been made and not on the instalments released by the 1<sup>st</sup> respondent.
5. A total amount of Kshs. 78,980,060/53 was released under the facility but there was failure and/or delay in releasing Kshs. 7,913,000/-. The parties agreed on a joint marketing exercise in order to fast track the sale of the units. However, despite as aforesaid, the 1<sup>st</sup> respondent issued statutory notices and unlawfully blocked access to the suit properties with security guards thereby preventing potential buyers from viewing the completed houses. The 2<sup>nd</sup> respondent had since advertised the suit properties for auction on 3/6/2020.
6. That the scheduled auction was in contravention of the **Public Health (Covid-19 Restriction of Movement of Persons and Related Measures) Rules, 2020**. That the respondents had acted maliciously in advertising the sale of the suit properties by disclosing both the open market value and reserve price contrary to the provisions of **section 97 of the Land Act, 2012**. The applicant therefore prayed for the orders sought in the Motion.
7. The 1<sup>st</sup> respondent opposed the application through a replying affidavit and further affidavit of **Christine Wahome** sworn on 15/06/2020 and 16/12/2020, respectively. It was contended that, in addition to the Loan facilities alluded to by the applicant, there was an additional facility of Kshs. 47,778,155/- out of which a sum of Kshs. 36,243,888/- was disbursed.
8. That contrary to the applicant's assertions, interest was payable monthly on the disbursed amounts. The applicant had failed to comply with his obligations under the facilities and there was an outstanding sum of Kshs. 143,550,629/53. It is for that reason that the 1<sup>st</sup> respondent had demanded the repayment of the outstanding sum.
9. That **Public Health (Covid - 19 restriction on movement of persons and related measures) Rules 2020** did not bar the 2<sup>nd</sup> respondent from conducting the auction of 3/6/2020. That **section 97 of the Land Act** refers to the best price reasonably obtainable and not otherwise.

10. In the premises, the 1<sup>st</sup> respondent acted within the law when a valuer valued the suit properties. The 1<sup>st</sup> respondent had not acted in bad faith and that the Court Order of 3/6/2020 was served after the auction of five (5) of the suit properties had been concluded. That as at 17/11/2020, there was an outstanding sum of Kshs. 128,208,381/73 due on the aforesaid facilities. The application should, in the premises, be dismissed.

11. The court has carefully considered the depositions of the respective parties, the evidence and submissions on record. This is an injunction application. The principles applicable are those enunciated in the case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358** wherein it was held: -

***“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”***

12. In **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] Eklr**, it was held: -

***“A prima facie ... is a case 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 as to call for an explanation or rebuttal from the latter.”***

13. In the present case, the applicant alleged that the 1<sup>st</sup> respondent was in breach of the terms set out in the Letter of Offer dated 21/5/2016. That it levied interest on the released instalments rather than after the full amount had been disbursed.

14. The 1<sup>st</sup> respondent produced the said Letter of Offer as “CW1” in the replying affidavit dated 15/6/2020. The same provided that: -

***“Interest is to be payable on a monthly basis on disbursed loan amounts”.***

15. **Clause 4.6** thereof provides: -

***“The Applicant will be required to pay interest only on advances from the day they are advanced until the approved building is completed or for a period of fourteen months from the date of the first advance whichever is the earlier. A statement will be issued showing the amount payable on the first of the month following the advance, showing the interest calculations and requiring the applicant to pay interest monthly in advance. Subsequently the applicant will be required to pay monthly instalments of principal and interest as shown in this Offer”.***

16. Similar provisions were contained in the subsequent Letter of Offer dated 8/7/2015. It is clear therefore that contrary to what the applicant asserted, interest on the facilities was payable from the day of advancement until the approved building was completed or for a period of fourteen/twelve months respectively from the date of the first advance whichever was the earlier. The 1<sup>st</sup> respondent produced correspondence to show that it kept on reminding the applicant of his said obligation throughout.

17. This is what the parties had agreed between themselves. The Court cannot rewrite the parties’ contract. See **National Bank of Kenya Ltd v Pipeplastice Samkolit (k) Ltd & another Civil Appeal No.95 of 1999.**

18. In this regard, the applicant’s contention that interest was only chargeable from when the entire loan was disbursed is unfounded. The letters sent to him by the 1<sup>st</sup> respondent indicating the monthly interest payable on the disbursements are a prove that the applicant was made aware of the interest payable but failed to perform his obligations on his part.

19. It was the applicant’s contention that the 1<sup>st</sup> respondent did not issue the statutory notices required under the ***Land Act, 2012*** prior to exercising the statutory power of sale. That further, it acted in breach of ***section 97 of the Land Act*** by disclosing the open market value and reserve price of the suit properties.

20. The 1<sup>st</sup> respondent retorted that it complied with the provisions of ***section 97(2) of the Land Act*** as it carried out the requisite valuations. Five of the suit properties were sold through auction at the best price reasonably obtainable at the time. It produced statutory notices which it contended had been served through post and physically upon the applicant.

21. From the record, the court noted that there were statutory notices that were served. Further, there was no any alternative valuation that was produced by the applicant to challenge the one relied on by the 1<sup>st</sup> respondent.

22. There having been no further affidavit to challenge and/or controvert the averments in the replying affidavit and further affidavit that the statutory notices were served as alleged therein, the burden of proof remained with the plaintiff and he failed to discharge the same.

23. In the circumstances, the best evidence rule is that the notices were served upon the applicant and that there was no evidence of under valuation as alleged.

24. As regards the alleged breach of Covid – 19 rules, the Court finds that the said regulations could not bar the public auction that was scheduled and held on 3/6/2020.

25. Accordingly, the Court finds that the applicant has not established any prima facie case with a probability of success.

26. Having found that a prima facie case has not been established, the Court need not consider the other limbs in the **Giella v. Cassman case**. However, if on appeal my views are sought, I hold the view that it was not proved that the applicant will suffer any irreparable loss if the injunction sought is not granted. The properties were given as security and there is no evidence that the 1<sup>st</sup> respondent has breached any of its obligations under the contracts with the applicant.

27. As regards the balance of convenience, the same tilts in favour of the 1<sup>st</sup> respondent to recover its outlay for the benefit of its depositors.

28. Accordingly, I find the application to be without merit and the same is dismissed with costs.

**DATED** and **DELIVERED** at Nairobi this 15<sup>th</sup> day of April, 2021.

**A. MABEYA, FCI Arb**

**JUDGE**