REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E183 OF 2021

MULTIPLE HAULERS (E.A) LIMITED ……..…… PLAINTIFF

VERSUS

PRIME BANK LIMITED ……..……. DEFENDANT

R U L I N G

1. This is a ruling on the plaintiff's Notice of Motion dated 9/4/2021. The same was brought under ***Article 40 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3, 3A and 63 (c) & (e) of the Civil Procedure Rules 2010, Orders 40 Rules 1, 3, 4 and 51 Rule 1 of the Civil Procedure Rules, 2010.***

2. The application sought orders to restrain the defendant from advertising, selling, transferring, dealing or otherwise realizing the property known as **LR. No. MN/I/214 Mombasa** ("the suit property") pending the hearing and determination of the suit.

3. There were other orders for a permanent injunction until the determination of the suit and for a determination of any amounts, if any, that is due to the defendant after the Set Offs of term deposits against the overdraft facility of Kshs. 300,900,000.00 as envisaged in the Facilities Agreement dated 4.3.16.

4. The application was supported by the affidavit of **Rajinder Singh Baryan** sworn on 9/4/2021. He deposed that, vide a facility agreement dated 4/3/2016, the plaintiff took out an overdraft facility of Kshs. 300,900,000/=, loan II of Kshs. 178,000,000/=, Loan III of US$ 2,500,000/= and loan IV of Kshs. 60,000,000/= with the defendant.

5. The overdraft facility of Kshs. 300,900,000/- was to be secured by a legal charge over **L.R. NO. 209/14070** and a corporate guarantee of Porsche Centre Nairobi Limited. The loan of Kshs. 178,000,000/= and that of US$ 2,500,000/= were secured by a legal charge dated 9.2.15 over the suit property.

6. In 2017, the plaintiff decided to restructure its financing and pay off the securities held by some banks inclusive of the defendant. That as part of the restructuring, the plaintiff accepted a facility letter from Stanbic Bank Kenya Limited, Standard Bank of South Africa Limited ("as Senior Agent and Security Agent"), NIC Bank Kenya PLC ("as original lenders") for a facility of US$ 92,750,000/= ("the senior facilities").

7. Further, the plaintiff entered into a mezzanine facility agreement dated 2/10/2017 with Barak Fund SPC to provide a loan facility of up to US$ 42,500,000/=. The senior loan facility was not disbursed but Barak Fund SPC Limited disbursed the full loan of US$ 42,500,000/= to the plaintiff which was utilized to pay off Loan II of Kshs. 178,000,000/= and Loan III of US$ 2,500,000 together with other loans from other banks.

8. That despite the plaintiff having fully paid the aforesaid Loans II and III, respectively on 28/12/2017, the defendant continued to hold onto the title to the suit property purporting it to secure other facilities not envisaged in the facility letter or the charge dated 9/2/2015.

9. The defendant released the title to the suit property to M/s Kaplan & Stratton Advocates who registered a charge thereon on 27/12/2017 in favour of Standard Bank of South Africa Limited. That with such registration, the defendant's interest over the title was extinguished. That since Loans II and III for which the title was security have been fully paid and discharged, the title should have been released to the plaintiff.

10. That Despite as aforesaid, on 8/3/2021 the defendant issued a 40 day statutory notice under ***section 96(2) of the Land Act 2012*** with a view to selling the suit property on/or before 15/4/2021. That the statutory notices issued under ***sections 90(1) and 96(2) offend the***

provisions of section 96(3) (g) of the Land Act 2012 for *"failing to notify another chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice"* and is thus defective and void *ab initio.* That the defendant's actions constitute unfair practice of making false, misleading or deceptive representation about the state of affairs of the plaintiff under the ***Consumer Protection Act No. 46 of 2012.***

11. That the suit property is now charged to a 3rd party namely Standard Chartered Bank of South Africa Limited, on behalf of the Senior and Mezzanine Lenders. That unless restrained by an injunction, the defendant will advertise the property for sale.

12. The defendant opposed the application vide the replying affidavit of **Alka Shahi** sworn on 22/4/2021. It was contended that the plaintiff was advanced various credit facilities vide Letters of offer dated 26/2/2015, 28/4/2015, 2/1/2016 and 4/3/2016, respectively. (herein collectively referred to as "the letters of offer"). That the suit property was a continuing security for all advances made.

13. It was further contended that the plaintiff and its guarantors accepted all the terms and conditions of the Letters of offer. That it was agreed in all the Letters of offer that the suit property was not specific to any facility and that it was to be a continuing security for further advances. Clauses 21 and 23 of the letters of offer were referred to.

14. That the charge dated 9/2/2015 over the suit property was perfected and registered pursuant to a Letter of offer dated 5/11/2014 which at the time stipulated to be a common security for the entire borrowing. At clause 25 of that letter, the suit property was to be a continuing security for the repayment of the debt as may from time to time be outstanding notwithstanding any settlement of account.

15. That the charge was not specific to any facility, and clause 12 thereof provided that the respondent would make further advances and give credit to the applicant on a current or continuing account and such further advances would rank, subject to the provisions of ***Section 82 of the Land Act***, in priority to any subsequent charge of the charged property.

16. That charge reserved the right of consolidation under the law. That clause 22 thereof, provided that the charge would be a continuing security and would not be satisfied, discharged or affected by any intermediate payment or settlement of account.

17. That the defendant was not privy to the financing arrangements by the plaintiff's other financiers. On 14/7/2017, the firm of Kaplan & Stratton Advocates provided an undertaking with several terms including that the facility of USD 138,000,000/= lent to the plaintiff from other consortium of lenders would be utilized to liquidate the outstanding liabilities due to the defendant together with interest (the redemption amount) which were secured by charge over the suit property.

18. However, the redemption amount was not paid whereby the defendant's advocates sued Ms. Kaplan & Stratton in **Nairobi E395 OF 2018 (OS) Kiruti 7 Co. Advocates v Kaplan and Stratton Advocates ("the said suit")** to enforce the professional undertaking for Kshs. 311,488,575.33.

19. Though the court dismissed the said suit on 2/8/2019, it acknowledged that the redemption amount had not been paid and the defendant still had a charge. That the title was thereby returned to the defendant leading to the issuance of the statutory notices of 17/11/2020 and 8/3/2021, respectively for Kshs. 448,840,101/08 in respect of the overdraft facility and in accordance with the judgment in the said suit.

20. The defendant contended that the plaintiff was guilty of material non-disclosure in failing to disclose that it was facing liquidation proceedings in **Insolvency Petition No. E010 of 2020 Synergy Industrial Credit vs Multiple Hauliers (EA) Ltd.** In those proceedings the plaintiff was seeking to adjourn the hearing of the liquidation for 12 months. The application was allowed on 18/9/2020 on condition that the plaintiff engages all unsecured creditors in formulating a restructuring plan on settling its indebtedness to the unsecured creditors.

21. In those proceedings, the plaintiff had admitted owing the defendant a sum of Kshs. 341,563,000/=.

22. That the original certificate is rightfully held by the respondent as the principal charge. That the judgment in HCCOMM Case No. E395 of 2018 (OS) is binding as it confirmed the bank's legal charge, and the redemption amount was not paid in accordance with the undertaking given.

23. The defendant contended that the supplemental charge held by the other lenders is invalid because the redemption amount was not paid in terms of the undertaking given on 28/9/2017. The debt continues to escalate and the plaintiff had not made any payment arrangements with the bank. The outstanding debt as at 31/3/2021 was Kshs. 453,223,977/68 which continue to accrue interest.

24. Both parties filed lengthy submissions which the Court has carefully considered. It was submitted for the plaintiff that the charge created over the suit property was only to secure Loans II and III, respectively. That the overdraft facility in the sum of Kshs. 300,900,000/= was to be secured by separate securities set out in the facility letter and that the suit property was not among those securities. That the amount of Kshs. 428,385,515/58 demanded by the defendant was not covered under the charge.

25. It was submitted that the notices issued by the defendant were invalid in so far as they demanded sums not covered under the charge. The case of **Symon Gatutu Kimamo & 587 Others vs East African Portland Cement Co. Ltd (2011) Eklr** was cited in support of that proposition.

26. It was further submitted that, due to the extremely difficult economic situation prevailing in Kenya and globally, on a balance of convenience the plaintiff stood to suffer more hard to its business if a temporary relief is not issued. That were the defendant to sell the suit property, it would occasion the plaintiff great financial loss in view of other facilities it has undertaken with the Senior and Mezzanine Lenders.

27. In its submissions, the defendant rehearsed its replying affidavit and cited the authorities set out in its list dated 3/5/2021. It was submitted that the plaintiff had not proved any prima facie case with a probability of success. That there being no prima facie case, the duty to address irreparable injury and balance of convenience does not arise. The case of **Delphin Kanuu Kamau vs Fina Bank Limited (2020) Eklr** was cited for that proposition.

28. It was submitted that the plaintiff had not established any prima facie case for reasons of perjury and material non-disclosure, the letters of offer and legal charge had a continuing security clause, the debt is admitted and the plaintiff is estopped by virtue of admissions. Further that dispute as to amounts due is not a ground to grant an injunction.

29. It was submitted that in accordance with ***Section 104 of the Land Act,*** a property offered as a security becomes a commodity for sale in the event of default. The case of **John Nduati Kariuki t/a Johester Merchants vs National Bank of Kenya Ltd (2006) eKLR** was relied on this point. That the existence of other charges on the suit property cannot be a ground for an injunction. The case of **Collogne Investments Limited vs KCB Bank Kenya Limited; Nakumatt Holdings Limited (Under Administration) (Proposed Interested Party) (2020)** was relied on. It was urged that the application be declined.

30. This is application for an interlocutory order of injunction. The applicable principles are well known as set out in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358.** These are that the applicant must establish a prima facie case with a probability of success. That if the injunction is not granted, the applicant will suffer loss that cannot be compensated by an award of damages and if the Court is in doubt, it will decide the matter on a balance of convenience.

31. In **Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] Eklr,** the court summarized the principles as follows: -

> ***"i) Is there a serious issue to be tried?;***
>
> ***ii) Will the applicant suffer irreparable harm if the injunction is not granted?***
>
> ***iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").***

32. I propose to consider the application before me on the foregoing parameters. The first limb is whether the plaintiff has established a prima facie case. A prima facie case was defined in the case of **Mrao Ltd v. First American Bank of Kenya Ltd & 2 Others [2003] Eklr,** to be a case in which on the material presented to court, a tribunal directing itself properly will conclude that there exists a right which has apparently been infringed by one party which calls for rebuttal by the other.

33. There is no dispute that the plaintiff is indebted to the defendant. The dispute is whether the Charge over the suit property covered the facility in respect of which the defendant now seeks to sell the suit property. Put in another way, is the suit property a security for the facility that is outstanding? The plaintiff contends it does not while the defendant contends it does.

34. To answer the foregoing question, it calls for the examination of the various documents relied on by the parties. These are the Letters of offer and the Charge document. It was the plaintiff's contention that while it took the overdraft facility, the security therefor was a property known as **L.R. No. 209/14070** and a Corporate guarantee by **Posche Centre Nairobi.**

35. The first on the line for consideration is the Charge dated 9/2/2015. The Charge is categorical that it was created to secure the principal sum of Kshs. 178,000,000/- and US$2,500,000. The recitals part in **Clauses B and C** thereof provided as follows: -

> ***"(B) The Bank has agreed, at the request of the Borrower, to make from time to time, loans or advances or to grant any financial facilities or other accommodation to the Borrower on condition that they are repaid together with interest in the manner set out in this document.***
>
> ***(C) The Borrower in consideration of the matters referred to in Recital (B) above has agreed to create a legal charge (being this charge) over the Charged Property to secure the principal sum of Kenya Shillings One Hundred and Seventy Eight Million (Ksh. 178,000,000/=) and United States Dollars Two million Five Hundred Thousand (USD 2,500,000.00) ("the Charge Debt") on the terms and conditions contained herein.***

42. **Clause 3** which provided for secured obligations stated: -

> ***"The amount secured by this Charge shall be the aggregate of the Charge Debt, all interest from time to time due or payable to the bank and all costs, taxes, liabilities, obligations, charges and expenses incurred by the Bank from time to time in relation to this Charge".***

36. The courts understanding of the totality of the above recitals was that the security was in respect of the obligations set out in Clause 3. The Clause restricted the amounts to Kshs. 178,000,000/= and US$2500,000/=. It did not state that it included "other advances as may be availed from time to time", in order to cover additional lending.

37. There were a total of 4 Letters of offer that were produced and relied on. These were dated 26/2/2015, 28/4/2015, 26/1/2016 and 4/3/2016, respectively.

a) In the Letter of 26/2/2015, the security was a Letter of Agreement for advance accounts, Letter of General Lien & Set off, Joint and several guarantee by Mr. Rajinder Singh Baryan and Mr. Tarlochan Singh Heer and Board resolution. It stated that the existing charge over the suit property was to continue to act as security for the temporary overdraft. The overdraft was for Kshs.150,000,000/-.

b) In the Letter of offer 28/4/2015 for an overdraft of Kshs.250,000,000/-, the securities specified included a Charge over **LR. No. 209/14070.**

c) In the Letter of offer of 26/1/2016 for an overdraft of Kshs. 60,000,000/-, the securities were set out in clause 7 thereof.

d) In the letter of 4/3/2016, stated that "the existing Legal Charge over property Plot LR. No. MN/I/214, Section I Mainland North, Mombasa to continue to act as security for Loan facilities II and III.

38. In view of the foregoing there arises a question as to whether the amount not expressly set out as the obligation secured can form part for which the security was created. This would have been discerned from the letter of offer that led to the creation of the Charge. Although the deponent of the Replying Affidavit referred to it in paragraph 6, the Court could not trace the same in the filed documents. All that the Court was able to see was the letters of offer that were made subsequent to the creation of the Charge.

39. It was the plaintiff's contention that the Charge dated 9/2/2015 secured Loans II and III only and not the overdraft facilities. That the said Loans II and III have been fully repaid and the defendant has no right to sell the suit property in respect of the facilities which were not specifically secured under the Charge.

40 . On the other hand, the Defendant contended that the Charge secured both Loans II and III and the overdraft facilities set out in the four Letters of offer set out above. That because under **Clause 23,** the Charge was a continuing security, it covered the subsequent facilities.

41 . The evidence on record shows that, subsequent to the Charge, the plaintiff was granted further facilities by way of overdraft facility. That fact is not denied. The dispute is whether the said facilities were secured by the Charge dated 9/2/2015. A strict reading of **Clauses (B), (C) and 3** of the Charge, would show that the Charge was in respect of *"the Charge Debt"*.

42 . According to **Clause (C)** of the Charge, *"the Charge Debt"* was the sum of Kshs. 178,000,000/- and US$2,500,000/-. This was Loans II and III. That was the amount that was secured under **Clause 3** of the Charge. That Clause did not specify that the secured obligations were outside the Charge Debt. A question arises as to whether a subsequent advance and/or facility could be secured thereunder. Further, can a letter of offer which is executed subsequent to the creation of a Charge increase the liability of a Chargor in the Charge without expressly varying the Charge?

43 . It was the defendant's contention that the Charge was a continuing facility and therefore it covered the subsequent overdraft facilities that are under challenge. **In Re Wallis Ex Parte Lickorish 25 [1890] QBD 176 at 181 Fry LJ** held: -

> ***"It is well settled that under the contract the mortgagor, if he desires to redeem the mortgaged property, must pay the principal debt, the interest thereon, all proper costs, charges, and expenses incurred by the mortgagee in relation to the mortgaged debt or the security; the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the security; the mortgagee's costs of the redemption action".***

44 . I fully endorse the foregoing rendition as the correct proposition of the law on redemption of mortgages and the recoverable accounts.

45 . In none of the subsequent Letters of offer was it expressly indicated that the facilities were being offered with the suit property being the security thereof. What the letters of offer did was to set out what securities the defendant held.

46 . However, in the Letter of offer of 26/2/2015 there was reference that the Charge already in existence was to be a security for the increase of the facility from Kshs. 50,000,000/- to Kshs.200,900,000/-.

47 **. Clause 7** of the said Letter of offer dated 26/2/2015 provided that: -

> ***"The existing Legal charge over commercial property plot L.R NO. 214/1, Section 1 Mainland North, Mombasa to continue to act as security for the temporary overdraft.***

48 . The question that arises is, can the said endorsement in that Letter of offer be taken to have incorporated the said facility into the said Charge? That is an issue for trial. The intention of the parties, since it is being disputed, can only be ascertained at the trial through cross examination of the witnesses.

49 . It is clear that there were other securities that were offered for said facilities. The defendant contended that since it had the right to consolidate the securities it held, it was entitled to decline the discharge of the Charge dated 9/2/2015 and sell the same to realize the outstanding amount.

50 . I note that in all the Letters of offer, the suit property was only mentioned as an existing security. It was not expressly stated that it would act as the security for the proposed advances. The issue for trial would be, without an express condition that the suit property was to act as security for the advances, whether the Charge dated 9/2/2015 can be a security for the said advances. The effect of the subsequent advances was to increase the "Charge debt" beyond what was stated in the Charge.

51 . ***Section 84 of the Land Act, No. 6 of 2012*** provides for the variation of the Charge. Since the Clauses referred to above in the Charge were restrictive and did not reserve the right to *"further and future advances of whatever nature"*, a question will arise as to whether or not there was need to have a Variation of the Charge in terms of the aforesaid ***section 84 of the Land Act.*** I hold the peremptory view that because of the letter and tenure of **Clauses (B), (C)** and **3** of the Charge, probably a variation was necessary to increase the liability beyond what was referred to as the Charge Debt".

52 **.** ***Section 84 of the Land Ac*** provides: -

> ***"(2) The amount secured by a charge may be reduced or increased by a memorandum which shall –***
>
> ***(a) comply with subsection (5)***
>
> ***(b) be signed –***
>
> ***• • •***
>
> ***(ii) by the chargor; and***
>
> ***(c) state that the principal funds intended to be secured by the charge are reduced or increased as the case may be, to the amount or in the manner specified in the memorandum.***
>
> ***• • •***
>
> ***• • •***
>
> ***(5) A memorandum for the purposes of subsections (2), (3) and (4) shall –***
>
> ***(a) be endorsed in the register or annexed to the charge instrument; and***
>
> ***(b) upon endorsement or being annexed to the charge instrument, vary the charge in accordance with the terms of the memorandum".***

56. The question that arises is as to whether the Letters of offer relied on by the defendant can be said to constitute a Memorandum under ***section 84 of the Act.***

57. In the circumstances, I am satisfied that the plaintiff has established a prima facie case with a probability of success. It will be a question at the trial whether; with the wording of the above cited Clauses in the Charge, there was room for the Charge to secure increased borrowing, whether the subsequent Letters of offer acted as a variation of the Charge, whether the liabilities under the said Letters of offer constituted proper security under which the Charge.

58. Accordingly, I find that the plaintiff has established a prima facie case with a probability of success.

60. The second issue is whether the plaintiff will suffer irreparable loss and damage. The Court appreciates that once a property is pledged as security, it is amenable to be sold as it becomes a chattel to be sold in case of default.

61. In the present case however, there is an allegation that the suit property is charged to other Lenders with the sanction of the defendant. That perse cannot be a basis for an injunction. See the case of **Collogue Investments Ltd vs KCB (***supra*). However, in the present case, it is alleged that the Charge in respect of which the same is proposed did not cover the facilities in question. If the sale is allowed to continue, it may jeopardize the plaintiff immensurably. Its effort to restructure its debt with other creditors may be in jeopardy.

62. It was the defendant's contention that the Charge had been validated in the said suit. However, that suit was in respect of enforcement of an undertaking. It was binding upon the parties thereto. The plaintiff was not a party and the issue of whether or not the disputed facilities were covered would not have arisen.

63. On the third limb, the balance of convenience tilts in favour of maintaining the status quo until the parties are heard at the trial.

64. In view of the foregoing, I allow the application in terms of prayer 2 of the Motion. The other prayers cannot be granted. They can only be granted after the trial. They are declined. I will award the costs of the application to the plaintiff.

It is so ordered.

DATED and **DELIVERED at Nairobi this 27th day of May, 2021.**

A. MABEYA, FCIArb

JUDGE