



**REPUBLIC OF KENYA**

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

**COMMERCIAL CASE NO E001 OF 2020**

**TROPICAL INSTITUTE OF COMMUNITY**

**HEALTH & DEVELOPMENT TRUST**

**(TICH) REGISTERED TRUSTEES.....PLAINTIFF**

**VERSUS**

**SBM BANK LIMITED.....DEFENDANT**

**RULING**

1. In its Notice of Motion dated 3<sup>rd</sup> November 2020 and filed on 4<sup>th</sup> November 2020, the Plaintiff sought orders to restrain the Defendant whether by itself, its agents, servants or any person claiming through them from selling disposing of or otherwise interfering with the Plaintiff's ownership of all those properties described as or comprised in Land Registration Nos 654/45 (IR 123371), L.R No Kisumu Municipality/Block 12/201 and L.R No Kisumu Municipality/Block 12/143 (hereinafter referred to as "subject premises") pending the hearing and determination of this suit.
2. The said application was supported by the Affidavit of Bishop James Ochiel, the current Chair of the Registered Trustees of Tropical Institute of Community Health & Development (TICH) who swore the said affidavit on behalf of the Plaintiff herein on 3<sup>rd</sup> November 2020.
3. The Plaintiff averred that it was a membership-based initiative that was started sometime in 1998 with its core objective being the provision of quality post-graduate training programs for Health and Development Workers in Kenya with a mission to build leadership for health and development through partnerships.
4. It explained that it incorporated the Tropical Institute of Community Health Development Trust Trustees under The Trustees (Perpetual Succession) Act through which it would hold property. The Trust Deed was registered on 7<sup>th</sup> July 1999. In 2011, it established a private university known as the Great Lakes University of Kisumu (hereinafter referred to as "GLUCK") and registered a Trust known as the Great Lakes University of Kisumu Trust to oversee the establishment of the said University.
5. It stated that GLUCK applied for a loan of Kshs 240,000,000/- from the Defendant's predecessor Chase Bank (K) Ltd against registration of charges over the subject premises and that its role in the matter was purely that of a guarantor.
6. It contended that the GLUCK Council appointed a Vice-Chancellor who was subsequently dismissed after disagreement between it and her and that her dismissal was a subject of various court cases.
7. It asserted that all along it was of the impression that GLUCK was paying the loan and that there was no one occasion when the Defendant informed it that it had defaulted. It opined that it was the Defendant's singular interest to sell the subject premises as its requests to have documentation of the said liability were not met making it difficult or it to know how the accounts were being run.
8. It also stated that it was never notified of the variation of the interest charged or other terms of the lending on the basis of which it had guaranteed the loan contrary to the law. It also denied ever having recollection of executing an application for consent to charge the subject premises as mandated by the Constitution. It added that it had conducted an official search and established that no charge was registered over L.R. No 654(IR 123371) and that the Defendant had not undertaken valuation of the subject premises.
9. It contended that it became aware of the default when on 2<sup>nd</sup> September 2020, Colinet Auctioneers, acting on instructions of the Defendant, served them with a forty five (45) days Notice to pay the sum of Kshs 303,644,381.75 as at 26<sup>th</sup> August 2020 with interest at 11.75% failure of which the suit properties will be sold. It further averred that it learnt from correspondence from GLUCK that the default of repayment of the loan was from the first quarter of the year 2016 and that GLUCK had already been listed with the Credit Reference Bureau as a bad borrower.

10. It was its contention that disposing of the properties to a third party would interrupt with on-going educational programs and hundreds of students, lecturers and stakeholders will be grossly inconvenienced in the event that the status quo is not maintained.
11. In response to the said application, on 26<sup>th</sup> November 2020, Kevin Kimani, a Legal Officer with the Defendant filed a Replying Affidavit on the Defendant's behalf. The said Affidavit was sworn on 24<sup>th</sup> November 2020.
12. The Defendant averred that vide a Letter of offer dated 26<sup>th</sup> June 2015, it advanced to GLUCK a Term Loan Facility to the tune of Kshs 230,000,000/= which was to be repaid over a period of one hundred and twenty months (120) months at an interest rate of sixteen (16%) per cent per annum on a reducing balance. In addition, late payments were to attract default interest at the rate of three decimal three three (3.33%) per cent per month over and above the amount payable.
13. It stated that the Registered Trustees of GLUCK executed the Memorandum of Acceptance thereby accepting all the terms and conditions. On 29<sup>th</sup> July 2015, it sent GLUCK a Supplementary Letter of Offer of even date varying the terms and conditions of the Letter of Offer dated 26<sup>th</sup> June 2015 by deleting clauses 2 and 4 and replacing the same. It was emphatic that the Letter of Offer dated 26<sup>th</sup> June 2015 remained valid and binding.
14. The Defendant further contended that vide another Letter of Offer dated 20<sup>th</sup> July 2015, it advanced the University a Further Term Loan of Kshs 10,000,000/= which facility was used to top up the existing loan. It added that it was a strict term of the said Letter of Offer that the facility would be repaid over a period of twelve (12) months with interest at the rate of eighteen (18%) per cent per annum on a reducing balance.
15. It asserted that it was also a term of the said offer that late payments would attract a default of 3.33% per month over and above the monthly amount due. It pointed out that the Registered Trustees of the University once again executed the Memorandum of Acceptance thereby accepting all the terms and conditions.
16. It was its contention that the above mentioned facilities were secured by a First Legal Charge over the subject properties securing payment of Kshs 240,000,000/= which properties were registered in the Plaintiff's name.
17. It further asserted that it varied the terms of the Letter of Offer dated 20<sup>th</sup> July 2015 by deleting clauses 6 and 7 and replacing the same and the Plaintiff executed again the Memorandum of Acceptance.
18. It stated that vide its letter dated 25<sup>th</sup> November 2016, it recalled the total outstanding balance of Kshs 206,285,466.70 due to failure by GLUCK to adhere to the agreed terms of repayment of the loan facility. It also sent GLUCK the University a Pre-listing Notice of adverse listing with the Credit Reference Bureau (CRB) in line with Banking (Credit Reference Bureaus) Regulations, 2013, when it failed to receive any positive response from it and the Plaintiff herein.
19. It averred that in an undated letter, CLUCK admitted default and offered to liquidate the loan by monthly installments of Kshs 500,000/= which it rejected vide its letter of 28<sup>th</sup> February 2017 because as at February 2017, the outstanding amount was in the sum of Kshs. 214,627,255.95 being the balance of the principal sum together with interest.
20. It pointed out that it sent GLUCK, the Plaintiff herein, the Trustees and the County Land Commissioner a ninety (90) days Statutory Notice on 23<sup>rd</sup> March 2017 via registered mail demanding immediate payment of the sum of Kshs. 214,719,673.45. It averred that instead of remedying the default, GLUCK and the Plaintiff filed Kisumu ELC No 250 of 2017 (Now Kisumu HCCC No 42 of 2018).
21. It said that in the aforesaid case, the Plaintiff offered to sell the subject properties to settle the debt and after protracted negotiations that spanned almost three (3) years, the Plaintiff's advocates forwarded to its advocates a consent vide an email dated 15<sup>th</sup> July 2020 to have the matter settled out of court. The matter was subsequently marked settled with no orders as to costs.
22. It was categorical that the Plaintiff could not now feign ignorance of what had transpired and had come to court with unclean hands. It added that due diligence was conducted in the registration of the Charge instrument and that the intended exercise of the power of sale was lawful and there therefore no valid reason to interfere with the same.
23. It was its case that the Plaintiff had not demonstrated what irreparable injury it was likely to suffer that could not be compensated by damages. It termed the present application vexatious, an abuse of the court process, an afterthought and only meant to delay Justice and urged this court to dismiss the same.
24. In response to the Defendant's averments, Plaintiff further swore a Supplementary Affidavit on 10<sup>th</sup> December 2020. It reiterated its averments made earlier on in the Affidavit sworn on 3<sup>rd</sup> November 2020 and challenged validity of the Charge Documents and composition of GLUCK Registered Trustees who it stated did not have any directors who would have signed the documents.
25. It also denied that the notices were ever sent to its postal address or that it ever instructed M/S Kago, Muthama & Co Advocates to represent it in the suit parties filed a consent. It accused the Vice-Chancellor for having colluded with the Defendant herein.
26. The Plaintiff filed its Written Submissions dated 10<sup>th</sup> December 2020 on 11<sup>th</sup> December 2020. The Defendant filed its Written Submissions dated 10<sup>th</sup> February 2021 on 11<sup>th</sup> February 2021. Parties adopted their Written submissions in their entirety. The Ruling herein is therefore based on the said Written Submissions.

## LEGAL ANALYSIS

27. The Plaintiff submitted that it had established a *prima facie* case with probability of success. It contended that the Defendant never advanced GLUCK any loan and that it never authorised the charging of the subject properties by way of a resolution. It stated that in any event that no charge had been registered against L.R. No 654/45 (IR 123371).

28. It was emphatic that the notice the Defendant issued it called for the entire outstanding sum which was contrary to Section 90 of the Land Act. In this regard, it placed reliance on the cases of Yusuf Abdi Ali Co Ltd vs Family Bank Limited [2015] eKLR. It added that that the Defendant further contravened Section 96 (3) (i) as read with Section 96 (2) of the Land Act in failing to affix on the property a copy of the 40 days notice.

29. It also argued that the Defendant failed to notify it of the default by GLUCK in its capacity as a guarantor contrary to Section 97(1) of the Land Act. It was its submission that had it known of the default earlier, the debt would not have ballooned to the amount risking the sale of the subject properties.

30. It was apprehensive that if the property moved to the hands of third parties, it would not be able to recover the same. It pointed out that the Defendant failed to bring any evidence to prove its ability to meet the damages in the event it prevailed on trial and it had sold the properties. It relied on the case of St Elizabeth Academy-Karen Limited vs Housing Finance Co of Kenya Limited [2013] eKLR where this very court held that in applications for injunctions, a respondent was required to demonstrate its ability to compensate an applicant in the event the matter was to proceed to trial and the applicant succeeded.

31. It further place reliance on the case of Manasseh Denga vs Eco Bank Ltd & Another [2015] eKLR where this very court also held that damages could not be adequate where there was a clear breach of law.

32. It urged this court to grant an injunction to enable the matter go to trial for the reason that the validity of the security and lending instruments were in question, that there was the question whether any money had been lent to GLUCK and the fact that it had called for documentation from the Defendant which it refused to furnish it with. It argued that this was not a suitable case for the re-issue of the Notices.

33. In response to the Plaintiff's argument, the Defendant submitted that it instructed Tysons Limited, a registered valuer to carry out a valuation of the suit premises and thus pointed out to court that the suit premises' value can be ascertained.

34. On its part, the Defendant submitted that the Plaintiff would not suffer irreparable loss since it was protected by Section 99(4) of the Land Act, 2012 which entitled it to a remedy in damages. It added that it was a financial institution capable of paying the damages if any and the Plaintiff had not shown any evidence to the contrary. It relied on the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others (supra) in this regard.

35. The court carefully considered the questions the Plaintiff considered triable issues but it found it prudent not to analyse the same for the reason that they were best determined by the Trial Court. It opted to address its mind to the documentation that had been placed before it.

36. First and foremost, it noted that GLUCK which was a party in HCCC NO 42 OF 2018 Great Lake University of Kisumu & Another vs Chase Bank Kenya Limited (In receivership) was not a party herein. The terms of the consent 5<sup>th</sup> October 2018 that was purportedly filed was in the following terms:-

1. **That the suit herein be withdrawn with no order as to costs.**
2. **That the Defendant be at liberty to proceed with the intended Auction.**
3. **That any monies realized from the Auction of the properties in excess of the amount owed being Kshs 304,000,000/= shall be deposited in the borrower's bank account held with the Defendant.**
4. **That the Defendant shall provide the Plaintiffs with all the documentation with regard to the intended auction.**
5. **That the Defendant shall upon realizing its full amount endeavor to de-list the 1<sup>st</sup> Plaintiff as a debt defaulter with the Credit Reference Bureau (CRB).**

37. The use of "purportedly" hereinabove was intentional as there was no court stamp to show if the said consent was filed on court. If it was indeed filed in court, then the same remained as an order of the court. Be that as it may, the Plaintiff did acknowledge that there was a suit which generated a consent to harm it. It did not furnish the court with any proceedings to show if the same had been set aside. For that reason, this court was persuaded that there had indeed been a consent but acknowledged that it could not sit on appeal on a decision that was recorded by a court of equal and competent jurisdiction.

38. The court was hesitant to pronounce itself on who had authority to sign the documentation. Suffice it to state that the Plaintiff did not challenge the authenticity of the signatories of the GLUCK Memoranda of Acceptance that were attested by an advocate.

39. The Defendant annexed a copy of an authority by the Plaintiff authorising the said charging. The signatures appearing thereon were for 31<sup>st</sup> August 2015 and 7<sup>th</sup> September 2015. The Plaintiff reiterated that it never signed the documents as there was no approval to borrow money from the Senate of GLUCK.

40. The court was concerned that the Plaintiff was approbating and reprobating in some instances. On one hand, in Paragraph 20 of the Supplementary Affidavit, it denied that it knew the entity known as Technical Institute of Community Health Development and Development in Africa (TICH). On the other hand, in Paragraph 21 of the said Supplementary Affidavit, it denied that Technical Institute of Community Health Development and Development in Africa (TICH) did not instruct a law firm going by the name of M/S Kago, Muthama & Co Advocates.

41. Going further, the court noted that there was a duly registered Charge over L.R. 654/45 by GLUCK. It was registered on 12<sup>th</sup> November 2015 having been presented on 29<sup>th</sup> October 2015. A copy of the Official Search showed that the Charge was entered as Entry No (6) thereon contrary to the Plaintiff's assertions. A Charge over Kisumu/Municipality/Block 12/143 was also noted in Part C of the Encumbrance Section of the Certificate of Lease on 12<sup>th</sup> November 2015. A similar note was made in Part C Encumbrance Section of the Certificate of Lease in respect of Kisumu/Municipality/Block 12/143.

42. Notably, a borrower at a bank is not necessarily the owner of the property that is to be charged. However, the Plaintiff was adamant that the Defendant failed to appreciate that any resolutions authorising GLUCK to borrow the money had to be under its seal. It further submitted that whereas the charge documents were executed under the seal of GLUCK Registered Trustees, it had no resolution to borrow the money. As it had indicated in its Supporting Affidavit that there were various court cases between it and the Vice-Chancellor, this court restrained itself from commenting on their differences as it had the potential of embarrassing other courts that may be dealing with the matters.

43. The court opted to limit itself to the establishing whether or not the Plaintiff had met the conditions that were set out in the case of **Giella vs Cassman Brown Company Ltd[1973] EA 358.**

44. This court agreed with the Plaintiff that the Notice that was issued by the Defendant was irregular and had no legal basis.

45. Section 90 of the said Land Act No 6 of 2012 provides as follows:-

**1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**

**2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—**

**a. the nature and extent of the default by the chargor;**

**b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months (emphasis court), by the end of which the payment in default must have been completed;**

**c. if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so at to rectify the default and the time, not being less than two months, by the end of which the default must have been rectified;**

**d. the consequence if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and**

**e. the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.**

46. In the Notice dated 25<sup>th</sup> May 2016, the Defendant wrote to the GLUCK Registered Trustees as follows:-

**“... Chase Bank (Kenya) Limited, at your request and instance, advanced to you banking facilities on the below account whose total account outstanding as at 25<sup>th</sup> November 2016 is Kshs 206,285,466.70...**

**We noted that you have failed to adhere to the agreed arrangement regarding repayment of the facilities and in consequence your loan is in total arrears of Kshs 23,216,173.43 as at 25<sup>th</sup> November 2016. Due to your default aforesaid, we now recall the entire debt and demand immediate repayment to us of the sum of Kshs 206,285,466.70...**

**TAKE NOTICE that three (3) months from the date of this letter, if you will not have paid the entire sum of Kshs 206,285,466.70..we shall be at liberty to pursue any of the remedies available to us...” ....**

47. A reading of the said statutory notice shows that the Defendant did not comply with Section 90(2) of the Land Act and any subsequent notices purportedly issued by the Defendant were invalid and hence null and void *ab initio*.

48. Going further, the Notification of Sale by the Auctioneers issued pursuant to instructions dated 26<sup>th</sup> August 2020 for a sale scheduled for 6<sup>th</sup> November 2020 was also invalid by virtue of the fact that the valuations of L.R. No Kisumu/Municipality Block 12/143 and L.R. No Kisumu/Municipality Block 12/201 were more than twelve (12) months. They were both dated 25<sup>th</sup> March 2019. Only the valuation for L.R. No 654/45 was dated 1<sup>st</sup> September 2020 was valid for purposes of the aforesaid sale as it was within the twelve (12) months window.

49. Notably, Rule 11(1)(b)(x) of the Auctioneers Rules, 1997 provides that:-

**“A court warrant or letter of instruction shall include, in the case of immovable property, the reserve price for each separate piece of land based on a professional valuation carried out not more than 12 months prior to the proposed sale.”**

50. The principles guiding the grant of orders for injunction are well settled in the celebrated case of **Giella vs Cassman Brown & Company Limited** (Supra). These are that the applicant has to demonstrate that it has a *prima facie* case with a probability of success, that it shall suffer irreparable injury which cannot be compensated by damages if the interlocutory injunction is not granted and that if the court is in doubt, then it shall decide the application on a balance of convenience.

51. Whereas the court was persuaded that Statutory Notice dated 25<sup>th</sup> May 2016 did not comply with the requisite law and therefore had no legal basis, it must be noted that issuance of invalid notices is not in itself a ground for a grant of injunctive orders for the reason that the omission can be rectified.

52. Whereas the court noted that the Plaintiff had raised many issues for determination, the same were between how it related with GLUCK Registered Trustees. The wrangles between it and the said Vice- Chancellor was exclusively an issue between them and it would be unfair for the Defendant to be dragged into their differences. This court limited to addressing itself to the relationship between GLUCK Registered Trustees, the Plaintiff and itself.

53. Having noted the Plaintiff's admission that GLUCK Registered Trustees entered into a consent for the sale of the subject properties, this court's hands were tied until such time that that consent was set aside. This court thus found and held that the Plaintiff had failed to show that there was collusion between it and the Vice Chancellor and hence failed to demonstrate a *prima facie* case against the Defendant herein.

54. Going further, the fact that many individuals would be affected by the sale of the subject properties was not a ground for granting an injunction. GLUCK Registered Trustees were aware that the subject properties were educational establishments with the resultant risk being sale in the event of any default. The Plaintiff failed to demonstrate that once the omission by the Defendant was rectified, the issue of damages not being an adequate compensation was applicable in the circumstances of its case. As a result, the balance of convenience tilted in favour of the Plaintiff in not having the order of injunction being granted herein.

#### **DISPOSITION**

55. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 3<sup>rd</sup> November 2020 and filed on 4<sup>th</sup> November 2020 was not merited and the same be and is hereby dismissed. As the Plaintiff was clearly in arrears and the Defendant did not fully comply with the provisions of the law, each party will bear its own costs of this application.

56. For the avoidance of doubt, the *interim* orders issued herein be and is hereby discharged and/or vacated. The Defendant is at liberty to proceed to realise its security provided that it strictly complies with provisions of the Land Act.

57. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF JUNE 2021**

**J. KAMAU**

**JUDGE**