



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CASE NO. 463 OF 2020**

**MARIAKANI COTTAGE HOSPITAL LIMITED.....PLAINTIFF**  
**VERSUS**  
**GULF AFRICAN BANK LIMITED.....DEFENDANT**

**RULING**

**NOTICE OF MOTION APPLICATION**

The Applicant filed an Amended Certificate of Urgency and a Notice of Motion Application dated **18<sup>th</sup> November 2020** for orders; -

1. An Order of Injunction be granted restraining the Defendant, its servants and/or agents from selling, alienating, transferring, charging, leasing or in any other manner whatsoever dealing with the Plaintiff's assets or alienating, transferring, charging, leasing or in any manner whatsoever dealing with any other securities held by the Defendant in respect of the Plaintiff's accounts.

Which Application was supported by the sworn affidavit of **DR. C B NTALO – WERE** dated **18<sup>th</sup> November 2020** on the grounds that; -

1. Vide a letter of offer dated **26<sup>th</sup> June 2018**, the Defendant offered three loan facilities to the Plaintiff being, Diminishing Musharaka Sale and Lease back facility of a limit of **Kshs.119, 430, 559** to finance takeover facilities from Development Bank of Kenya, Diminishing Musharaka Sale and Lease Back Finance Facility of **Kshs.20, 000, 000** to finance purchase of medical equipment and Murahaba Finance Facility of a limit of **Kshs.10, 000, 000** for the purpose of financing working capital.

2. In return, the Plaintiff charged its property **L.R No. 209/3611, L.R No. 209/5318** and all debenture over company assets for **Kshs.149, 430, 559**.

3. Owing to the Covid-19 pandemic the Plaintiff experienced severe losses and was unable to meet its loan obligations for loan repayments. The Plaintiff therefore wrote to the Defendant seeking to restructure the loan repayments.

4. On **9<sup>th</sup> October 2020**, the Defendant ignored the Plaintiff's appeal to have the loan restructured and served the Plaintiff with a demand letter for the outstanding arrears of **Kshs.4, 969, 461.76**.

5. On **23<sup>rd</sup> October 2020**, without considering the Covid-19 pandemic, the Defendant served the Plaintiff with a Notice of Sale of the charged property **L.R No. 209/3611** and **L.R No. 209/5318** and intends to sell the said properties after the expiration of 40 days from the date of service, **23<sup>rd</sup> October 2020**.

6. The Plaintiff has made efforts towards clearing the loan arrears and on **7<sup>th</sup> August 2020** deposited **Kshs.4, 000, 000** with the Defendant but the Defendant remains insensitive, impervious in proceeding with actions to sell the charged properties.

**REPLYING AFFIDAVIT**

The Application was opposed vide the sworn Affidavit of Lawi Sato dated **17<sup>th</sup> November 2020** and stated that;

1. The Plaintiff's Application and suit is fatally defective and is unmerited for the following reasons;

- a. The suit offends **Order 4 Rule 1(4) of CPR 2010** as no authorization under seal was given by the Plaintiff.
  - b. The prayers sought are incapable of being granted as they will be spent upon inter partes hearing of the Application.
  - c. Economic hardship, which is the Plaintiff's sole ground, is never a basis for granting an injunction.
2. The Plaintiff applied for credit facilities which were advanced on the terms and conditions contained in the Letter of Offer dated 26<sup>th</sup> June 2018.
  3. The Plaintiff defaulted in repaying the loan and at the Plaintiff's request, the Defendant restructured the loan on the terms and conditions contained in the Letter of Offer dated 28<sup>th</sup> May 2019. After the restructure, the Plaintiff defaulted in payment and the loan was again restructured on the terms and conditions contained in the Letter of Offer dated 20<sup>th</sup> December 2019.
  4. The default in repaying the loan was prior to Covid-19 and therefore, the Plaintiff's claim that it defaulted on its repayment obligations due to the Covid-19 pandemic is without basis.
  5. The Plaintiff has requested for another restructuring of its loan and as part of evaluating the Plaintiff's ability to repay, the Plaintiff and the Defendant scheduled a site visit for 16<sup>th</sup> November 2020. However, the Plaintiff instituted the present suit and served the Defendant with the order and Notice of Motion on 13<sup>th</sup> November 2020. The Plaintiff cannot therefore claim that its request was not considered.
  6. The court process cannot be used to force the Defendant to restructure the loan. That would amount to re-writing the contract for the parties.
  7. The Defendant followed the law in the exercise of its statutory power of sale as it gave a three-month Statutory Notice dated 17<sup>th</sup> July 2020 and forty-day Notice to sell dated 23<sup>rd</sup> October 2020.
  8. The Plaintiff voluntarily gave LR NO. 209/3611 and LR No. 209/5318 as security and agreed that the Defendant would sell them in case of default. Now that there is admitted default, the Plaintiff cannot say it will suffer irreparable injury if the properties are sold.

#### **FURTHER AFFIDAVIT**

In response to the Respondent's Affidavit, the Applicant filed a sworn Affidavit by **DR. C B NTALO – WERE** dated 2<sup>nd</sup> December 2020 and stated; -

1. The Applicant duly filed authority to act sealed by the Plaintiff herein authorizing Dr. Ntalo Were to swear affidavits and execute documents on its behalf.
2. Contrary to the Respondent's assertion, the letter dated **28<sup>th</sup> May 2020** was to the effect that the Respondent would advance an extra loan facility of **Kshs.5, 413, 192.44** to the Applicant with no extension of the loan repayment period.
3. The letter informing the Applicant that its request for a restructure would be considered by the Respondent was served upon it after the Applicant had instructed its advocates to file the suit. In addition, the request for site visit scheduled for 16<sup>th</sup> November 2020 was made after the suit was filed.
4. The decision by the Applicant, to file the suit, was made after the Applicant received a Notice of Sale of the charged property **LR NO. 209/3611** and **LR No. 209/5318** on **23<sup>rd</sup> October 2020**, from the Respondent threatening to sell the said properties after expiry of 40 days from the date of service.
5. Owing to the Covid-19 pandemic, no known contract would not be frustrated and that it is for this reason that the Government of Kenya pleaded severally with Banks and financial institutional lenders to offer moratorium to loanees laboring under the affliction aforesaid such as the Applicant.
6. The Applicant has established a *prima facie* case which merits grant of the orders sought in the Application and further, that the value of the Applicant's suit property is not capable of being ascertained with mathematical accuracy as indicated by the Respondent and the same requires a qualified valuer to ascertain its value which valuer the Respondent has not produced.

#### **APPLICANT'S SUBMISSIONS**

The Applicant submitted that the Covid-19 pandemic greatly impaired its ability to meet the loan obligations as there were delays in payment by insurance companies as well as NHIF and occasioned frustrated expectations and the doctrine of frustration ought to apply to the Applicant. In the case of *Davis Contractors Ltd –versus- Fareham U.D.C [1956] A.C 696*, Lord Radcliffe at page 729 held; -

**“...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a**

**thing radically different from that which was undertaken by the contract. ‘Non haec in foedera veni’ – it was not what I promised to do.”**

Further, the Respondent stated that tenants who occupied **LR No.209/3611** (subject of the threatened sale) were unable to pay their monthly rents due to the Covid-19 pandemic and widespread national closure of businesses and the Advisory against levying rents from tenants in distress, this formed part of the Applicant’s source of income used to repay the loan.

It was the Applicant’s submission that it has made tremendous efforts towards clearing the loan arrears, which efforts have slashed the loan arrears to **Kshs.4, 472, 052.30** as at **27<sup>th</sup> October 2020**. The default in repayment was for roughly one and half months by the time the Applicant received the Notice of Sale. The Applicant has established a *prima facie* case warranting grant of the orders of injunction.

On whether the Applicant will suffer irreparable loss, the Applicant submitted that from 2018 to October 2020, it had paid a total of **Kshs.64, 339, 668** to the Respondent in part settlement of the loan. This is approximately half of the advanced loan of **Kshs.149, 430, 559**. The Applicant’s charged properties present market value is over **Kshs.200, 000, 000**. If the Respondent sells the charged property, in the current financial climate, the Applicant stands to suffer irreparable loss yet it paid part of the loan and is willing to settle the balance.

The Plaintiff has received notices from various Insurance companies notifying it of the inevitable delay in payments for example NHIF which has greatly impaired the plaintiff’s ability to pay its loan obligations timeously.

This sale will also affect the Applicant’s employees and their families through adverse economic and social afflictions.

The Applicant submitted that it has surpassed the threshold of a prima facie case with high probability of success as was held in the case of ***Mrao Ltd –versus- First American Bank of Kenya and 2 Others [2003] KLR 125*** where the Court of Appeal defined a prima facie case as:

**“.....a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter....”**

In addition, the Applicant submitted that it is willing to pay the pending loan arrears and has never stopped looking for alternative ways of settling the same.

#### **RESPONDENT’S SUBMISSIONS**

The Respondent submitted that the Plaintiff that the evidence on record irrefutably confirms that the Plaintiff defaulted before the Corvid 19 pandemic. There are letters of 28<sup>th</sup> March 2019 & 28<sup>th</sup> December 2019 restructuring the Plaintiff’s facilities after default. There are letters of 21<sup>st</sup> October 2019, 28<sup>th</sup> October 2019 & 11<sup>th</sup> November 2019 that the Plaintiff admits indebtedness.

The Respondent submitted that the Applicant’s basis for seeking an injunction is the economic hardship attributed to the Covid-19 pandemic. However, the evidence on record shows that the Applicant’s default in repayment of the loan started before the Covid-19 pandemic. Okwany L J. in rejecting a similar argument in ***Vehicle & Equipment Leasing Limited –versus- Jamii Bora Bank Limited [2020] eKLR*** stated;

**“the Plaintiff does not deny its indebtedness to the defendant but attributes its financial woes to the global Covid-19 pandemic which it states has led to global economic downturn...as can be seen in the loan statements of accounts, the plaintiff’s default and indebtedness existed as at 31<sup>st</sup> October 2019 long before Covid-19 that as declared a pandemic in Kenya in March 2020. I am therefore not satisfied that the plaintiff’s application meets the condition on prima facie case for the granting of orders of injunction as its indebtedness is neither disputed nor explained.”**

It is therefore clear that there is no legal basis upon which financial problems attributed to Covid-19 pandemic would sustain an Application for injunction.

It was submitted by the Respondent that the Applicant failed to prove that it will suffer irreparable loss. In upholding a refusal of an injunction in ***Anita Chelagat O’donovan & 2 Others –versus- Fredrick Kwame Kumah & 2 Others [2017] eKLR*** the Court was emphatic that;

**“The law has long been that once a property is offered as security for financial advances, it immediately becomes liable to be liquidated as a commodity in the property market, the tender memories and deep emotions associated with it notwithstanding.”**

The Respondent submitted that Corvid 19 pandemic is not sufficient basis to grant an injunction as was held in ***Khunaif Trading Company Limited vs Equity Bank Limited & Anor [2015] e KLR & Kenya Commercial Finance Co Ltd vs Kipngeno Arap Ngeny & Anor [2002] e KLR***

Which held that ‘**downturn in business**’ and ‘**El Nino rains**’ did not frustrate the contract.

The Respondent further submitted that it is not for the Court to tell parties how to contract as was stated in;

**Lalji Karsan Rabadia & 2 Others vs Commercial Bank of Africa Limited [2015] e KLR** which held as follows;

**I have always thought, and still think, that it is of the utmost importance as regards contracts between adults- persons not under disability, and at arms's length- that the Courts of law should maintain the performance of contracts according to the intention of parties' that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves.**

## **DETERMINATION**

After considering the pleadings and submissions filed by the parties the issue for determination is whether the Applicant has satisfied the requirements for grant of an order of injunction.

The law on granting of interlocutory injunction is set out under **Order 40(1) (a) and (b) of the Civil Procedure Rules 2010** which provides:

**Where in any suit it is proved by affidavit or otherwise—**

**(a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;**

**b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further.**

The test for granting of an interlocutory injunction was also considered in the American *Cyanamid Co. –versus- Ethicom Limited (1975) A AER 504* where three elements were noted to be of great importance namely:

**“i. There must be a serious/fair issue to be tried,**

**ii. Damages are not an adequate remedy,**

**iii. The balance of convenience lies in favour of granting or refusing the application.”**

The conditions for consideration further in granting an injunction is now well settled in the case of *Giella –versus- Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction: -

**"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."**

**Has the Applicant established a *prima facie* case with a probability of success?**

It is the Applicant's case that the Respondent served the Applicant with a Demand Notice on 9<sup>th</sup> October 2020 and on 23<sup>rd</sup> October 2020 Notice of Sale of the charged property **LR NO. 209/3611** and **LR No. 209/5318** on **23<sup>rd</sup> October 2020**, the Respondent threatening to sell the said properties after expiry of 40 days from the date of service.

The Applicant stated that the purported actions by the Respondent is threatening to cripple the Applicant and its employees and will paralyze and kill off the Applicant's business.

It is the Applicant's contention that it has made tremendous efforts towards clearing the loan arrears and has continued to repay the loan despite ravaging aftershocks of Covid-19 pandemic.

It is the Applicant's contention that from 2018 to October 2020, it had paid a total of **Kshs.64, 339, 668** to the Respondent in part settlement of the loan. This is approximately half of the advanced loan of **Kshs.149, 430, 559/- including Ksh 4,000,000/-** The Plaintiff submitted it has resolute intention and great efforts to settle the arrears and continue repaying the loans as the Corvid -19 curve is flattening.

The Corvid -19 pandemic has had adverse effect to the business as would be patients kept away from the hospitals generally the plaintiff included and inflicted the Plaintiff with severe losses.

The Plaintiff awaits payments from NHIF among other Health Insurance Companies and rental payments of the Plaintiff's property.

In light of the above, the Applicants have demonstrated that they have established a *prima facie* case with probability of success.

**Will the Applicant suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed?**

The Applicant's charged properties present market value is over **Kshs.200, 000, 000**. If the Respondent sells the charged property, the Applicant stands to suffer irreparable loss yet it paid part of the loan and is willing to settle the balance.

Further, the Applicant has employed several workers and the Respondent's actions will likely cause unfathomable ripple economic and social afflictions to the said workers as well.

The Plaintiff's business will be paralyzed and strangled in the event of statutory power of sale being effected in default of serving the loan facilities.

Looking at the Respondent's Replying Affidavit, the Respondent had informed the Applicant that it would consider restructuring the Applicant's loan repayment and had even scheduled a site visit for 16<sup>th</sup> November 2020. The Respondent further stated at paragraph 13 that;

**As part of evaluating the Plaintiff's ability to repay, the Plaintiff and the Defendant scheduled a site visit for 16<sup>th</sup> November 2020. However, the Plaintiff instituted the present suit and served the Defendant with the order and Notice of Motion on 13<sup>th</sup> November 2020. Therefore, the Plaintiff cannot claim that its request is not being considered when it is the one frustrating those deliberations.**

The import of the above statement is that the Respondent was already willing to consider restructuring the loan prior to the filing of this Application and therefore the Respondent will not suffer if the injunction is not granted.

#### **Where does the balance of convenience lie?**

The Plaintiff's business is a hospital expending medical services to in and out patients and Corvid 19 pandemic directly affected the business adversely.

In the case of **Paul Gitonga Wanjau -versus- Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus: -

**"Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favor of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. "**

This Court takes judicial notice under **Section 60 (o) of the Evidence Act** of Corvid 19 pandemic since March 2020 and its adverse impact to the political, economic and social standards of society which in turn has affected businesses and financial institutions alike including the parties herein.

The Defendant has also presented evidence that the Plaintiff defaulted way before the Corvid 19 pandemic and the Defendant granted restructure of the loan facility as shown by correspondence referred to.

The Plaintiff does not deny indebtedness and non -service of the loan facility as per the terms of the contract, but has made payments of almost half the amount.

The Plaintiff annexed letters from various CEOs seeking intervention of Cabinet Secretary (CS) of Health to have NHIF release payment to health providers, the Plaintiff included.

The Plaintiff's tenancy project is also not bearing financial returns due to the pandemic.

Whereas the Defendant has complied with terms of the contract and statutory notices were lawfully served, without rewriting the terms of the terms contract the circumstances explained by the Plaintiff are compelling to explain default.

#### **DISPOSITION**

- 1. The Court grants interim/temporary injunction in terms of Prayer 1 of Amended Notice of Motion of 18<sup>th</sup> November 2020 for 90 days.**
- 2. The Plaintiff shall continue to service the loan facility and make payments during the said period.**
- 3. In default of servicing the loan facility execution -statutory power of sale to be effected as required by the contract.**
- 4. Each party to pay its own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JULY 2021. (VIRTUAL CONFERENCE DUE TO CORVID 19 PANDEMIC MEASURES RESTRICTING OPEN COURT OPERATIONS AS PER CHIEF JUSTICE DIRECTIONSOF 17TH APRIL 2020)**

**M.W. MUIGAI**

**JUDGE**