



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. E062 OF 2021**

**KWALE CEMENT FACTORY LIMITED**

**SHRIKE INVESTMENT LIMITED**

**LUCAS INVESTMENT LIMITED**

**RISING STAR COMMODITIES LIMITED .....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. The Ruling herein is in respect of a **Notice of Motion** application dated **24<sup>th</sup> June, 2021**, **Notice of Preliminary Objection** dated **8<sup>th</sup> July, 2021** and a **Notice of Motion** application dated **7<sup>th</sup> September, 2021**.
2. The **Notice of Motion** application dated **24<sup>th</sup> June, 2021** by the Plaintiff/applicant seeks for the following orders:-
  - a) *Spent;*
  - b) *Spent;*
  - c) *That, pending the hearing and determination of the suit, there be an injunction restraining the Defendant, its agents or employees from advertising for sale, selling by public auction, or private treaty, transferring, disposing or in any other manner alienating parcel of land known as Mombasa/Block 1/261 Shimanzi LR. No.MN/1/7601 Nyali, Kwale/Shimoni Adjudication/352 & 376 Kibuyuni Village.*
  - d) *The costs of this application be awarded to the Plaintiffs.*
3. The same is grounded on twenty two (22) grounds on the face of it, and 24 in the **Supporting Affidavit** sworn by **ALI BADRUDIN PUNJANI**, one of the Plaintiffs/Applicants. The highlights are that the Defendant attempted to unlawfully sell the properties whereupon the Plaintiffs filed a suit **No.ELC No.062 of 2018**. After the application was heard, the order of injunction were confirmed.
4. The parties then engaged in negotiations to amicably resolve the dispute, a consequence of which the suit was withdrawn by consent of both parties. The parties agreed on certain terms, among them being that the Respondent would aggressively market the charged properties to obtain the best price in the market; that the Plaintiff would donate specific powers of Attorney to the Defendant to assist in the marketing and sale by Private Treaty, and that the Plaintiff would provide additional collateral to secure any exposure. Further, that the Respondent would not sell **LR. No.MN/1/760/Nyali** and **Mombasa/Block 1/261 Shimanzi** being residences of the Director and offices of the Respondent.
5. That the Respondent reneged on these conditions and has proceeded to advertise the properties for sale without due process as laid down by **Sections 90 and 96** of the **Land Act, 2012**. The advertisement is a violation of **Section 97** of the **Land Act, 2012** and **Rule 11(b)(x)** of the **Auctioneers Rules 1997**. Lastly, that the Plaintiffs have not been served with the notification for sale as required by law and therefore there is need for an injunction.
6. The **Supporting Affidavit** has set out similar paragraphs and annexed supporting documents such as certificates of title at paragraph 3, the former suit at paragraph 5, the email setting out the matters discussed in the meeting of **20<sup>th</sup> December, 2019** at paragraph 7(c) and

paragraph 12 exhibit sale of land not objected to in these proceedings. That because of these negotiations, the Defendant is estopped from realizing the securities and therefore an injunction be granted. The Applicant states that it will suffer prejudice unless the orders are granted.

7. The Motion is opposed by the **Notice of Preliminary Objection** dated **8<sup>th</sup> July, 2021** on the following ground:-

*a) The entire suit as brought out and filed offends the provisions of Article 165(5)(b) of the Constitution of Kenya, 2010 as read with Article 162(2) and Section 13 of the Environment and Land Act in that the court lacks jurisdiction to hear and determine this suit.*

*b) The suit relates to a claim on Environment and Land, clearly offending the mandatory provision of Article 165(5)(b) and 162(2) of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act.*

*c) The application as brought by the Plaintiffs/Applicants is res-subjudice as it attempts to raise same issued to be determined in the application dated 15<sup>th</sup> June, 2021 in ELC No.64 of 2018, KWALE CEMENT FACTORY LTD & 3 OTHERS -VS- NATIONAL BANK OF KENYA.*

8. Simultaneously, the Defendant filed an application dated **7<sup>th</sup> September, 2021** in which it sought for the following orders:-

*a) THAT, this application be certified urgent and service be dispensed with in the first instance;*

*b) THAT, the Ex-parte injunction issued by the Honourable Court on 24<sup>th</sup> June, 2021 be set aside, varied and/or discharged.*

*c) THAT, the costs of this application be provided for.*

9. The application is premised on seven (7) grounds, the gist being that this suit is similar to the **ELC No.64 of 2018** suit that was withdrawn and that the Plaintiffs have been extended colossal amounts which it is not servicing hence causing loss to the Defendant.

10. The **Supporting Affidavit** further provides evidence that the suit that was withdrawn did not settle the dispute and there is bill of costs yet to be determined in the sum of Kshs.67,661,596.30..

11. The Motion is opposed by a **Replying Affidavit** sworn by **ALI BADRUDIN PUNJANI** on **23<sup>rd</sup> September, 2021**. The main issues raised are that the Defendant was aware of the existence of **ELC No.64 of 2018** and that the issues in that case are different from the current one. Lastly, that the withdrawal of the suit was a show of good faith to uphold its terms of settlement.

12. The applications came up for hearing on **9<sup>th</sup> July, 2021** and the parties agreed to dispose of the same by way of written submissions. The Plaintiff filed their submissions together with a list of authorities on **23<sup>rd</sup> September, 2021**. The Defendant/Respondent equally filed their written submissions and list of authorities on even date.

#### **PLAINTIFFS' SUBMISSIONS**

13. In their submissions, the Plaintiffs stated that the suit relates to **Mombasa/Block 1/261 Shimanzi, LR No.MN/1/7601 Nyali and Kwale/Shimanzi Adjudication/352 and 376 Kibuyuni Village**. That the registration which followed between the parties was that the first two properties would not be old and the third property would be sold through Private Treaty to fetch the highest price.

14. Consequent to this agreement, the Plaintiff submitted that they withdrew the case being **ELC No.64 of 2018**. Further, the Plaintiff submitted that the High Court has jurisdiction to entertain this suit because it is of commercial nature and relied on the decisions in the cases of:-

*a) Co-operative Bank of Kenya Ltd -vs- Patrick Kangethe Njuguna[2017]eKLR.*

*b) TSS Investments Ltd -vs- NIC Bank Ltd[2019]eKLR; and*

*c) Joel Kyatha Mbaluka -vs- Daniel Ochieng Ogola[2019]eKLR.*

15. In these cases, the courts held that the High Court has jurisdiction in suits of commercial nature.

16. On the issue of *res-judicata*, the Plaintiffs submitted that there is law that support the position. That a matter which was withdrawn without being determined on merit raised a bar to a subsequent suit and relied on the decisions in the case of **GEORGE W. M. OMONDI & ANOTHER, -VS- NATIONAL BANK OF KENYA LTD [2002]eKLR**. The Plaintiffs submitted further that they are not guilty of non-disclosure of material facts and supported their view by stating that indeed that they told court that **ELC No.64 of 2018** was withdrawn. The Plaintiffs concluded that they are entitled to the injunction by the principal of estoppel, failure to serve Statutory Notice and absence of current valuation all of which support a cause of action.

#### **DEFENDANT'S SUBMISSIONS**

17. The Defendant/Applicant, submitted and opined that there are only two issues for trial, which it summarized as whether the Defendant's

application dated 7<sup>th</sup> September, 2021 and the Plaintiff's application dated 24<sup>th</sup> June, 2021 are merited. It submitted that an injunction is discharged when it turns out that it is not serving the intentions of justice or such ends of justice as demanded. The Defendant referred the court to the decision in the case of MOBILE KITALE SERVICE STATION –VRS- MOBILE OIL KENYA LTD & ANOTHER[2004]eKLR.

18. On the issue of material non-disclosure, it referred the court to the decision in the case of KENYA ELECTRICITY TRANSMISSION LTD –VRS- KITUBU LTD[2019]eKLR. It further submitted that the relationship is the one created by the charge and rights of parties are those conferred by that instrument.

19. In its view, failure of the Defendant to service the debt disentitled the Plaintiff of the injunction, the court was referred to the celebrated case of GIELLA –VRS- CASSMAN BROWN. The Defendant also submitted that because the Plaintiff admitted its indebtedness to the Defendants, it had not made out a case to warrant the grant of an injunction. The Defendant has referred to the decision in the case of YUSUF ABDI AZI & CO. LTD –VRS- FAMILY BANK LTD [2015]eKLR and urged the court to follow the finding in the case of NGURUMAN LTD –VRS- JANE BONDE NEILSON & 2 OTHERS.

#### DETERMINATION

20. I have read through the pleadings, the supporting documents and written submissions by the parties, the cited authorities (case law and statute) by both parties. I find that the Defendant having raised a **Preliminary Objection** with regard to this court's jurisdiction and *res-subjudice*, I agree with the issue of jurisdiction is raised, it is trite that the same must be dealt with before other issues can be dealt with.

21. In the case of MV LILIAN –VRS- CALTEX OIL (K) LTD[1989]KLR, where the late Nyarangi JA stated as follows:-

*“I think that it is reasonable plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away, on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. When a court has no jurisdiction, there would be no basis for a continuation of the proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it hold the opinion that is without jurisdiction”.*

22. This principle has been adopted and followed by the Court of Appeal in their recent decision, such as the case of PHOENIX E. A. ASSURANCE CO. LTD –VRS- S. M. THIGA T/A NEWSPAPER SERVICES [2019]eKLR, where the appeal was allowed in a case where the Appellant had sought to review a decision that had been dismissed his case for lack of jurisdiction.

23. The Defendant has premised its **Preliminary Objection** on three grounds. The first objection is that the suit offends **Article 165(5)(b)** as read with **Article 162(2)** of the **Constitution, 2010** and **Section 13** of the **Environment and Land Court Act, 2021**. The said provisions are set out as follows:-

#### *Article 165(5)(b)*

*(5) The High Court shall not have jurisdiction in respect of matters—*

*(a) .....*

*(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).*

#### *Article 162(2)(b)*

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

*(a) .....*

*(b) the environment and the use and occupation of, and title to, land.*

24. **Section 13** of the **Environment and Land Court Act** provides as follows:-

*“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land”.*

25. In my view, the above provisions are very clear in that, the answer to when a party and the court are faced with such a situation, lies in the prayers the party is seeking. The facts of the **Plaint** herein are that the Plaintiff borrowed from the Defendant money which they secured with their properties. They failed to pay the loans and willingly offered certain properties to be sold. That they mutually agreed that the properties, the subject of this suit, should be sold as a last resort after all others are sold and there is still money owing to be paid to the Defendant.

26. The Plaintiff has equally submitted that courts have already determined disputes over similar causes of action and the cited decisions such

as those in the cases of Co-operative Bank of Kenya Ltd –vs- Patrick Kangethe Njuguna[2017]eKLR, TSS Investments Ltd –vs- NIC Bank Ltd[2019] eKLR; and Joel Kyatha Mbaluka –vs- Daniel Ochieng Ogola[2019] eKLR, speak to this wherein they affirmed that a matter of security for a loan over land is of a commercial nature and does not fall among the matters listed under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2013**.

27. From the summary of the dispute herein, the cause of action is clearly a commercial relationship, which went sour hence this court has jurisdiction to determine the matter. The objection on jurisdiction is therefore found to be without merit and the same is dismissed.

28. The application dated **24<sup>th</sup> June, 2021** seeks for an injunction while the application dated **7<sup>th</sup> September, 2021** seeks to discharge the interim orders of this court granted on **24<sup>th</sup> June, 2021**. On the onset, I wish to state that the determination of the applications dated **24<sup>th</sup> June, 2021** will dispose of the later application.

29. The Applicant submitted that it had offered various facilities to secure loans advanced to it and had defaulted, upon which they agreed to the sale of certain properties through private treaty after aggressive marketing. That contrary to this agreement, the Defendant has gone on to advertise the sale of these properties, and contrary to agreed aggressive marketing. Further, that the Defendant has not complied with the provisions of **Sections 90** and **96** of the **Land Act, 2012**.

30. In reply, the Defendant raised a **Preliminary Objection** which we have disposed of and an application dated **7<sup>th</sup> September, 2021** which raised among other grounds, that this suit is *res-judicata* as the Plaintiff failed to disclose material facts; that the court made orders on **11<sup>th</sup> November, 2021** where the Plaintiff was condemned to pay costs which it failed to agree and a bill for taxation filed.

31. Consequently, I have agonized over the prayers sought and the amounts of public money involved, and find that the injunction sought is oppressive to the Defendant and its customers, hence it ought to be discharged.

32. It is trite that the conditions for grant of an injunction are well settled in the East African Courts. In Kenya, the courts have applied, and keep applying the test in the case of GIELLA –VRS- CASSMAN BROWN, where SPRY, V.P, of the Court of Appeal for East Africa stated as follows:-

1. *A party ought to prove that he has a prima facie case with a probability of success.*
2. *If the order of injunction is refused, the Applicant will suffer irreparable loss that cannot be compensated with an award of damages.*
3. *In the event the court is in doubt, on the balance of convenience.*

33. A *prima facie* case has on many occasions been variously defined but it is no more than the existence of a set of facts giving rise to rights protection by a law which the Defendant has trampled over. In a relationship as the one existing between the Plaintiff and the Defendant, the law governing the actions of either party is enacted by the **Land Act, 2012**. **Section 90** of the **Land Act 2012** provides as follows:-

*“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”.*

34. The contents of the notice are provided for under **Sub-section (2)** among them the amount in default. If after the exhaustion of the process the above-mentioned Section through to **Section 95**, that the chargee has the right to exercise its powers under **Section 96** of the **Act**. **Section 96(1)** provides as follows:-

*96(1) Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.”*

The Act continues to provide under **Sub-section (2)** as follows:-

*(2) Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”.*

35. What I make of these provisions is that the two hurdles must be surmounted by the Defendant before it can exercise its legal rights to foreclose. I have perused the documents on record to find any documents that complies with the law, and must say that there is not any on record.

36. The instant case is clear. The Defendant has permission to sell certain properties belonging to the Plaintiff to recover the loan advanced. There are restrictions on how the same should be sold. What the Defendant ought to tell the court is that it has sold securities surrendered to it by the Plaintiff and there is a deficit. To comply with the promise, it issued a proper notice under the law to sell other properties. The Plaintiff did not

plead that it had complied with the law. In the circumstances, I find and hold that the Defendant failed to invoke the law in its effort to sell

the property.

37. After this finding, it is an exercise in abundance to enter into the next requirement save that it is fitting for the court to observe that the Plaintiff is willing to have all properties sold except that the ones that are the subject of this suit to be sold last, if there will be any residue of the loan

after the authorized sale of the properties. Since there is clear willingness to sell by the Plaintiff, there will be no irreparable loss that cannot be compensated for by an award of damages.

38. This court is informed that the properties intended to be preserved are the residence of the Director of the Plaintiff and the Plaintiff's place of business. The court is informed that if the properties are sold, the Director's residence and the business office would have gone permanently effectively closed down to the detriment of both parties.

39. For the reasons given above and based on the facts of this case, the application for injunction in part dated **24<sup>th</sup> June, 2021** to the extent that:-

*a) An injunction be and is hereby granted restraining the Defendant, its servants, agents, nominees, heirs, from in any manner disposing of by way of sell the following properties Mombasa/Block 1/261 Shimanzi, LR. No.MN/1/760/Nyali for a period of six (6) months only from the date of this order and the order of injunction pending Kwale/Shimoni Adjudication/*

*352 & 376 is hereby lifted.*

*b) The Preliminary Objection dated 8<sup>th</sup> July, 2021 be and is hereby dismissed with no order as to costs.*

*c) Application dated 7<sup>th</sup> July, 2021 is allowed in part to the extent that the order of injunction against Kwale/Shimoni Adjudication/352 & 376 is discharged.*

*d) Each party to bear own costs.*

Orders accordingly.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF NOVEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. GIKANDI COUNSEL FOR THE PLAINTIFFS**

**MR. KAZUNGU COUNSEL FOR DEFENDANT**

**COURT ASSISTANT - BANCY**