



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E254 OF 2019**

**TYPOTECH IMAGING SYSTEMS LTD.....PLAINTIFF**

**VERSUS**

**COMMERCIAL BANK OF**

**AFRICA LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff seeks the following orders in the Notice of Motion dated 16<sup>th</sup> August 2019:

**1. Spent**

**2. Spent**

**3. Spent**

**4. Spent**

**5. That pending the hearing and determination of this suit, the defendants/respondents herein, their servants, assigns and/or agents be restrained from trespassing unto, entering, dealing and tampering with, alienating, selling, disposing of or in any way interfering with all the properties known as Go-Downs Nos 10(IR NO 160693) and No. 11(IR NO. 160694 on LR No. 209/11286(IR NO 49409) THREE BEES COMPLEX and TOWN HOUSE NO. 11 ERECTED ON LR NO 330/234 NORTH BROOK GARDENS (suit properties).**

**6. That pending the hearing and determination of this application inter-partes, the 1<sup>st</sup> defendant/respondent herein, their servants, assigns and/or agents be restrained from exercising its statutory power of sale on all the properties known as Go-Downs Nos 10(IR NO 160693) and No. 11 (IR NO. 160694 on LR No. 209/11286(IR NO 49409) THREE BEES COMPLEX and TOWN HOUSE NO. 11 ERECTED ON LR NO 330/234 NORTH BROOK GARDENS (suit properties).**

**7. That pending the hearing and determination of this suit, the 1<sup>st</sup> defendant/respondent herein, their servants, assigns and/or agents be restrained from exercising its statutory power of sale on all the properties known as Go-Downs Nos 10(IR NO 160693) and No. 11(IR NO. 160694 on LR No. 209/11286(IR NO 49409) THREE BEES COMPLEX and TOWN HOUSE NO. 11 ERECTED ON LR NO 330/234 NORTH BROOK GARDENS (suit properties).**

**8. That the cost of this application be provided for.**

2. The application is supported by the affidavit of the plaintiff's Managing Director, **Mr. Alfred Kandarrah**, and is premised on the grounds that:-

**1. The 1<sup>st</sup> respondent offered various loan facilities to the applicant.**

**2. Despite the applicant fulfilling her obligation to pay the stated loan facilities, the respondents are in the process of illegally and**

*unlawfully disposing the applicant's properties namely Go-Downs Nos 10 (IR NO 160693) and No. 11 (IR NO. 160694 on LR No. 209/11286 (IR NO 49409) THREE BEES COMPLEX and TOWN HOUSE NO. 11 ERECTED ON LR NO 330/234 NORTH BROOK GARDENS via a public auction (hereinafter referred as to "suit properties").*

*3. The applicant avers that it has never been served with the mandatory statutory notices as stipulated by Section 90(2) (b) and Section 96(2) and (3) of the Land Act upon the applicant.*

*4. On instructions from the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent has now caused an advertisement to be placed in the Daily Nation newspaper on 5<sup>th</sup> August 2019 for the sale of the suit properties in the 20<sup>th</sup> August 2019.*

*5. The statutory notices notwithstanding, the applicant had engaged the 1<sup>st</sup> respondent with a proposal for restructuring the loan facilities subsequently leading to an agreement with the 1<sup>st</sup> respondent to not only redeem the suit properties through sale by private treaty but also to clear the outstanding balances.*

*6. Unless this honourable court intervenes, there is imminent danger that the suit properties will be sold, alienated and/or ownership interfered with and as such, cause irreparable damage to the applicant.*

*7. Additionally, the imminent sale will frustrate the contractual obligations arising from the agreement to sell the suit properties by private treaty.*

*8. It is in the interest of justice that this application is certified urgent and heard during this honourable court vacation.*

*9. Unless this honourable court intervenes, the applicant stands to suffer irreparable damages and losses.*

*10. That the intention of the defendants in issuing statutory notices and advertising the suit properties for sale is not only in bad faith but also malafide.*

*11. The provision of Section 104(2) of Land Act provide for cancelling, varying, suspending, and or postponing any scheduled sale or extending the period of time for compliance by the charger or substitution of a different remedy than outright sale.*

*12. It is in the interest of justice that the application be allowed.*

*13. There has been no delay in bringing the application and therefore, no real prejudice will be suffered by the respondents if the application is allowed.*

3. The 1<sup>st</sup> defendant opposed the application though the replying affidavit of its Head of Remedial Management Unit **Dr. Jacob Ogola** who confirms that the plaintiff obtained a loan facility from the 1<sup>st</sup> defendant. He adds that the said facility stood at Kshs 61,768,488.11 and USD 733,063.43 as at 22<sup>nd</sup> August 2019 due to the plaintiff's default thus necessitating the 1<sup>st</sup> defendant's exercise of its statutory power of sale.

4. He avers that contrary to the plaintiff's claim that it was not served with the statutory notices, the plaintiff acknowledged the receipt of the said notices as shown in the correspondence attached to the replying affidavit as annexures "JO5", "JO6 (a-d)" and "JO7"(a-b).

5. He further states that the plaintiff has all along been aware of the steps being taken by the 1<sup>st</sup> defendant to recover the loan as is shown in the copies of correspondence marked "JO11" and that the plaintiff even sent 1<sup>st</sup> defendant a draft sale agreement showing their intention to sell the suit property by way of private treaty so as to settle the debt.

6. He states that the plaintiff was accorded all the opportunity to remedy the default in order to redeem his property and that the scheduled auction of the suit property ought to be allowed to proceed so as to enable the chargee recover the loan arrears due to it.

7. Parties canvassed the application by way of written submissions which I have carefully considered. The main issue for determination is whether the applicant/plaintiff has made out a case for the granting of the orders of injunction.

8. The question which then arises is whether the reasons advance by the plaintiff would warrant the issuance of orders of temporary injunction to restrain the 1<sup>st</sup> defendant from exercising its statutory power of sale.

9. The principles governing the granting of interim orders of injunction were set out in the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 353 and restated, together with their mode of application in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, CA No. 77 of 2012, as follows:

*"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*1. establish his case only at a prima facie level,*

*2. demonstrate irreparable injury if a temporary injunction is not granted, and*

3. *allay any doubts as to (b) by showing that the balance of convenience is in his favour.*

*These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86). If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. (Emphasis added).*

10. I will now turn to consider if the plaintiffs' application meets the threshold set for the granting of temporary orders of injunction.

#### **Prima facie case**

11. It is well established that, in order to secure an injunctive relief the applicant must first establish a prima facie case with high chances of success. The Court of Appeal pronounced itself on what constitutes a prima facie case in *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] KLR 125 as follows:-

*"A Prima facie case in a civil application includes but 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 later".*

12. I am alive to the fact that at this stage, I am not determining the main suit and my role is to determine whether the applicant has established a prima facie case against the Respondents so as to qualify for the orders sought in the application under consideration. In determining whether the plaintiffs have established a prima facie case, it is necessary to examine the law, the pleadings filed herein and the arguments presented by both parties.

13. It was not disputed that the plaintiff obtained a loan facilities from the 1<sup>st</sup> defendant and that the said facilities were secured by:-

*i. Personal Guarantee and Indemnity by Alfred Aluoch Kandarrah. (Attached herein and marked "JO-1" is a copy of the Personal Guarantee and Indemnity by Alfred Aluoch Kandarrah).*

*ii. Personal Guarantee and Indemnity by Caroline Akinyi Kandarrah (Attached herein and marked "JO-2" is a copy of the Personal Guarantee and Indemnity by Caroline Akinyi Kandarrah).*

*iii. Legal charge over properties known as GODOWN NO. 10 AND GODOWN NO. 11 ERECTED ON L.R. NO. 209/11286. (Attached herein and marked "JO-3" is a copy of the charge document).*

*iv. Legal charge over properties known as L.R. NO. 330/234.*

*v. Fixed and Floating Debentures over all the assets of the borrower.*

14. It was also not disputed that the plaintiff defaulted in making the loan repayments and that such default necessitated its initiation of negotiations with the 1<sup>st</sup> defendant with a proposal to restructure the loan facilities.

15. I note that even though the plaintiff claims that it has been servicing the loan facility despite the threat of auction by the 1<sup>st</sup> defendant, the statements of accounts attached to the plaintiff's affidavit as annexure AK-5 reveal that the last time the plaintiff paid the loan was in October 2018 and that as at August 2019, the loan account had a closing balance of kshs 34,423,699.51. In the circumstances of this case and considering the clear evidence to show that the plaintiff is indeed indebted to the 1<sup>st</sup> defendant, I find that the plaintiff has not established that it has a prima facie case against the 1<sup>st</sup> defendant so as to warrant the granting of the orders of injunction. The mere fact that the 1<sup>st</sup> defendant agreed to indulge the plaintiff, *albeit* for a brief period of time to enable the plaintiff to put its house in order and settle the debt, did not connote that the 1<sup>st</sup> defendant had given up its rights to recover the loan arrears due under the loan agreement.

16. In *Kyangaro v Kenya Commercial Bank Limited & Another* [2004] I KLR 126 it was held:-

*"Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently he has not done equity. In the hands of the plaintiff, a permanent injunction would wreak havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by defaulters. Even lenders and chargees have their own rights."*

**17. In light of the undisputed fact that the plaintiff is truly indebted to the 1<sup>st</sup> defendant, I find that the plaintiff has not satisfied the first condition for granting orders of injunction as regards the establishment of a prima facie case.** Having regard to the findings on the issue of prima facie case, I do not find it necessary to consider the other conditions for granting the orders of injunction. **I am however still minded to consider the other issues raised by the plaintiff in the application.**

**18. The plaintiff claimed that there was lack of proper service with the statutory notices by the 1<sup>st</sup> defendant prior to the intended sale of the suit property by way of public auction. I however note that contrary to the plaintiff's claim that it was not issued with any statutory notices, the 1<sup>st</sup> defendant demonstrated through annexures "J05"- JO7" that it served the requisite notices on the plaintiff. I therefore find that the plaintiff was properly served with the requisite statutory notices.**

19. Be that as it may and even assuming that the said statutory notices were not served on the plaintiff, courts have severally held that lack of or improper service of statutory notices cannot be a basis for barring a charge from exercising its statutory power of sale where a default has been established. This was the position taken by the Court of Appeal in *National Bank of Kenya Limited v Shimmers Plaza Ltd* [2009] eKLR wherein the learned judges held as follows:

*"We venture to say that where the court is inclined to grant an interlocutory order restraining mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law. We respectfully think that the learned judge did not exercise his discretion judicially in the circumstances of this case when he granted an order of injunction until the determination of the suit."*

20. For the above reasons, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of May 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

No appearance for the parties

Court Assistant: Sylvia