REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.179 OF 2019

LEVNEL ENTERPRISES LIMITED.....1ST PLAINTIFF

FREDRICK G. NDEGWA.....2ND PLAINTIFF

VERSUS

GROFIN SGB KENYA LIMITED.....1ST DEFENDANT

ANTIQUE AUCTIONEERS.....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated **25th July 2019** by which **LEVNEL ENTERPRISES LIMITED (the 1st Plaintiff/Applicant)** and **FREDRICK G. NDEGWA** (the 2ND Plaintiff/Applicant) seek the following orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. This court be pleased to issue orders restraining the Defendants/ Respondent by themselves, their officers, servants, agents or anyone acting on their behalf from attaching, transferring, alienating, advertising, selling, or in any other way interfering with that property known as L.R NO.SAMURU/ MWITINGIRI/BLOCK 1/798, or any other property of the Applicants pending the hearing and determination of the suit.**
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> **4. SPENT**
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> **5. That the Court be pleased to issue an order restraining the Respondent from listing the Applicants with the Credit Reference bureau pending the hearing and determination of the suit.**
>
> **6. SPENT**
>
> **7. SPENT**
>
> **8. The costs of the application be provided for.**

(2) The application which was premised upon **Order 40 rule 1 of the Civil Procedure Rules 2010,** and **Section 3A** of the **Civil Procedure Act** and all other enabling provisions of the law was supported by the Affidavit of even date sworn by the 1st Applicant and the Supplementary Affidavit dated **28th October 2019** sworn by **GRACE MUMBI** a Managing Director of the 1st Plaintiff/Applicant.

(3) The 1st Defendant/Respondent **GROFIN SGB KENYA LIMITED** opposed the application through the Replying Affidavit dated **14th August 2019**, sworn by **RITA ODERO** an Investment Executive working with the 1st Defendant/ Respondent. The application was canvassed by way of written submissions. The Plaintiff/Applicants filed their written submissions on **23rd October 2019** whilst the 1st Defendant/Respondent filed its submissions on **19th November 2019.**

BACKGROUND

(4) The 1st Plaintiff obtained a loan facility of **Kshs.20,000,000** from the 1st Defendant through a Facility Agreement dated **13th December 2016**. The facility was to be repaid with interest at the rate of 19% per annum calculated daily and charged monthly.

(5) The said loan facility was secured by a charge dated **31st December 2016** registered over land title Number **SAMBURU/MWITINGIRU/BLK 1/798** (hereinafter referred to as the "**charged property**"). The loan was also secured by a continuing guarantee and indemnity of the 2nd Plaintiff dated **31st January 2017** as well as the personal guarantee and indemnity of one **GRACE MUMBI GITHAIGA** dated **31st January 2017**.

(6) The Plaintiffs defaulted in repayment of the facility as agreed and the 1st Defendant moved to realize its security. The Plaintiffs challenge the sale by auction of the charged property and filed this application seeking interim interlocutory orders.

(7) The Plaintiffs admit to having secured a loan facility from the 1st Defendant and also concedes that the facility fell into arrears. The Plaintiffs state that on **7th December 2018** they issued a promissory note dated **6th November 2018** (Annexture "**FN-2**" to the Supporting Affidavit dated **25th July 2019**) to the Defendant undertaking to repay the facility which by now stood at **kshs.23,652,751** by way of monthly installments of **kshs.100,000/=.** The 1st Defendant declined this proposal and instead sought to realize their security. The Plaintiffs aver that they were never served with the statutory 90 day notice in accordance with **Section 90(2)** of the **Land Act 2012** nor were they issued with a Notification of Sale as required by **Section 96** of the same Act. The Plaintiffs further aver that no valuation was undertaken on the charged property. They submit that in view of all the above irregularities the intended sale of the suit property by way of public auction scheduled for **31st July 2019** is illegal, null and void hence the present application seeking interlocutory orders.

ANALYSIS AND DETERMINATION

(8) I have carefully considered the submissions filed by both parties. The Plaintiffs by their application seek interlocutory injunctive orders. The conditions for grant of such orders were set out in the case **GIELLA VS CASMAN BROWN & CO. [1973] E.A,** where it was held:-

> **"…firstly, the 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." See *Giella Vs Cassman Brown & Co. Limited."***

PRIMA FACIE CASE

(9) The definition of a "**prima facie case**" was given in the case of **MRAO –VS- FIRST AMERICAN BANK OF KENYA LTD & 20 TOHERS [2003] KLR, 123,** where it was held:-

> **"In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right, which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the later.**
>
> **A prima facie case is more than arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

(10) The Plaintiffs have faulted the 1st Defendant for failing to issue them with the requisite statutory notices before advertising the charged property for sale.

(11) However the 1st Defendant insists that it did issue the 90 day notice required by **Section 90** of the **land Act**, advising the Plaintiffs of their intention to sell the suit property if the default was not rectified. Annexed to the 1st Defendant's Replying Affidavit dated **14th August 2019** (Annexture "**RO-4**") are copies of the said notices dated **23rd July 2018** together with the Certificate of posting. I have perused the said Notice and note that it was addressed to **Levnel Enterprises Ltd** (the 1st Plaintiff) **Fredrick Ndegwa** (the 2nd Plaintiff) and **Grace Mumbi Githaiga** the (Guarantor). The notice indicated that the arrears being demanded as at **23rd July 2019** was **Kshs.4,626,862/=.** The three certificates of posting indicate that the notices were posted on 2**4th July 2018**. I also note that copies of the said notices were also indicated as having been forwarded to the Plaintiffs by e-mail.

(12) It is clear without a shadow of doubt that the 90 day notice was sent to the Plaintiff's at their last known postal address. In **KYANGORO –VS- KENYA COMMERCIAL BANK [2004]** it was held that:-

> **"A statutory notice served on the Chargor's last known address in the chargors records is properly served within the meaning of Section 153 of the Registered Land Act."**

(13) In the supplementary Affidavit sworn by **Grace Mumbi Githaiga** at Paragraph 6 it is averred that the Postal address used by the 1st Defendant had in the months of May been allocated to another subscriber on account of the failure by the owners of that address to make the required payments to the Postal Corporation of Kenya. This in my view is not a persuasive or logical argument. In support of the Plaintiff's contention that they did not receive the Statutory notices. The Plaintiffs do not deny that the addresses used were the very addresses that they had themselves supplied to the Bank. If there was any change of address for whatsoever reason the onus lay on the Plaintiffs to inform the

Bank of their change of address. The Plaintiff cannot now seek to hide behind their own failure to pay for their postal box as an excuse to claim lack of service. I am satisfied that by sending the notices to the last known address supplied to the Bank by the Plaintiffs, the bank satisfied its obligations under **S.90** of the **Land Act**.

(14) Furthermore, I note that in cases where a registered letter cannot be delivered to the addressee the same would be returned to the sender. There is no evidence that any of the letters containing the statutory notices was returned to the 1st Defendant. A reasonable presumption can be drawn that the said letters were in fact delivered to the addressees. Therefore, I reject the allegation by the Plaintiffs that they were not served with the 90 day statutory notice. The Plaintiffs do concede that they were served with the 45 day notification of sale under **Section 90 – Land Act**. The said Notice dated **21st May 2019** is annexed to the Plaintiff's supporting Affidavit dated **25th July 2019** (annexture "**FN-1**")

(15) The Plaintiffs submit that the 1st Defendant failed to comply with **Section 97(2)** of the **Land Act** in that no valuation was undertaken on the charged property before the sale by auction was advertised. Again this is not the correct position. The sale was advertised to take place on **31st July 2019**. Annexed to the Replying Affidavit dated **14th August 2019** is a Valuation report dated **10th April 2019** (annexture "**RO-8**") commissioned by the 1st Defendant. The said Valuation report was prepared by **Danco Limited** and gave a value of **Kshs.16,800,000** for the charged property with a forced sale value of **kshs.15,750,000/=.**

(16) The Plaintiffs allege that the 1st Defendant intended to sell the charged property at an undervalue and have annexed a Valuation dated **20th September 2019** prepared by **Fahari Valuers Limited** (Annexture "**GNG-2**" to the supplementary Affidavit dated **28th October 2019**) giving a different value for the charged property being **Kshs.24, 700,000** with a forced sale value of **Kshs.18,000,000.**

(17) The mere fact that a valuer engaged by the Plaintiffs has returned a different valuation on the same property does not mean that the Bank failed to exercise its obligations under **Section 97(2)** of the **Land Act**. In **Zum Zum Investment ltd Vs Habib Bank Limited [2014] eKLR, Hon Lady Justice Mary Kasango** held as follows:-

> **"In my view the Plaintiff has not demonstrated satisfactory why this court should disregard the Defendants valuation report and only rely on the Plaintiffs valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter valuation. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendants intend to rely on in disposing the suit property does not give the best price obtainable at the material time. The Plaintiff needs to show for instance, that the Defendant valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds."**[own emphasis]

(18) The obligation imposed upon the Bank by **Section 97(1)** and **(2)** of the **Land Act** was to procure a recent valuation for the charged property. I find that the 1st Defendant fully complied with this requirement.

(19) The Plaintiffs allege that they were not availed with accounts to indicate precisely how much was outstanding on the facility. Firstly, the amount due was clearly stated in the statutory notices sent to the Plaintiffs. The 45 day Notification of Sale dated **21st May 2019** which the Plaintiffs concede to having received clearly indicates that the debt due is **Kshs.23,652,751.00**. (Annexture **"RO-9a**" to the 1st Defendant's Replying Affidavit). It is blatantly dishonest for the Plaintiffs to claim no knowledge of how much was owed to the Bank. In any event it has been held severally that a dispute over accounts is not sufficient reason to injunct an impending sale. In **MOHAMED KHALED KHASHOGGI –VS- EQUITY BANK LIMITED [2013] eKLR**, it was held that:-

> **"Accordingly, I agree with the Plaintiff's submissions that it is now settled law that the issue of disputed accounts and interest cannot be a ground for the issuance of injunctive orders."**

(20) Similarly in the case of **HABIB BANK Ag VS POP FNK LTD Civil Appeal No.147 of 1989**, it was held:-

> **"That a court should not grant an injunction restraining a mortgage from exercising its statutory power of sale solely on the ground that there is a dispute to the amount due under the mortgage."**

Therefore, I find no merit in this argument

(21) Finally the Plaintiffs submit that they have always been ready and willing to offset their debt and fault the Bank for declining to accept the promissory note dated **6th December 2018** by which the Plaintiffs offered to pay **Kshs.100,000** per month until the debt was cleared.

(22) Firstly, the Bank was under no obligation to accept the Plaintiffs promissory note. Secondly the Plaintiffs are bound by the four corners of the Facility Agreement dated **13th December 2016**. (Annexture "**RO-1**" to Replying Affidavit dated **14th August 2019**). The Plaintiffs had no capacity to unilaterally alter the agreement with regards to repayment.

(23) All in all, based on the above discussion and findings I hold that the Plaintiffs have failed to establish a prima facie case to warrant the grant of the injunctive orders being sought. In the circumstances the court need not interrogate further whether the other grounds set out in **Giella -Vs- Casman Brow**n [supra] have been established.

(24) In **NGURUMAN LIMITED -VS- JAN BONDE NIELSEN & 2 OTHERS [2014] eKLR**, it was held:-

> **"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. <u>If prima facie case is not established, then irreparable injury and balance of convenience need no consideration</u>. 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**."[own emphasis]

However, in the interest of completeness I will now proceed to consider the other grounds.

(25) The Applicants in their written submissions state that they cannot adequately compensated by an award of damages in the event of the charged property is sold. I can do no better that to quote the case of **ANDREW MURIUKI –WANJOI –VS- EQUITY BUILDING SOCIETY LTD [2006] eKLR**, in which the court held that:-

> **"…by offering the suit property as security the charger was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. <u>Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property</u>."**[own emphasis]

(26) Likewise in **NAHASHON K. MBATIA –V- FINANCE COMPANY LIMITED [2006] eKLR, Justice Hatari Waweru** observed as follows:-

> **"What about irreparable loss? Neither in the plaint nor in the application has the Plaintiff pleaded any special or unique attachment to the suit property. <u>In any event, having charged the property, the Plaintiff converted it to a commercial commodity with a monetary vale that can be easily ascertained. Its loss can always be made good by an appropriate award of monetary compensation</u>. There is no allegation that the Defendant will not be in a position to meet such award. I hold, therefore, that the Plaintiff may not suffer irreparable loss**."[own emphasis]

(27) Finally on this point in **Palmy Company Limited Vs Consolidated Bank of Kenya [2014] eKLR, Justice Gikonyo** held as follows:-

> **"The court held that damages are an adequate remedy as once a property is given as security, it becomes a commodity and it is subject to sale. Accordingly, in the unlikely event that the court finds in favour of the Plaintiff, the value of the charged property is ascertainable and any loss suffered by the Plaintiff's upon the sale of the same, is remediable by an award of damages."**

<u>BALANCE OF CONVENIENCE</u>

(28) The debt relates to a facility granted to the Plaintiffs way back in **December 2016**. To date the facility remains outstanding. The 1st Defendant's rights to sell the charged property have crystallized. It is unjust to have them given the run around through the court system by the Plaintiffs. On the whole, I find that the balance of convenience tilts in favour of the 1st defendant.

(29) The Plaintiffs did not in their submissions address prayer (5) of the application regarding reference to the Credit Reference Bureau. It appears that said prayer has been abandoned. Accordingly, I make no orders in respect of prayer (5) of this Motion. In the result I find no merit in the present application. The Notice of Motion dated **25th July 2019** is hereby dismissed in its entirety and the costs are awarded to the 1st Defendant.

Dated in **Nairobi** this **16th** day of **June 2020**.

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Justice Maureen A. Odero