REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E230 OF 2019

OBADIAH MUTISYA KITONYI........................PLAINTIFF/APPLICANT

VERSUS

KENYA COMMERCIAL BANK LTD..............................1ST DEFENDANT

JOSEPH MUSEMBI MALA

T/A SINGLELINE CONTRACTORS.............................2ND DEFENDANT

RULING

1. Before this Court is the Notice of Motion application dated **29th July 2019** by which **OBADIAH MUTISYA KUTONYI** (the Plaintiff/Applicant) seeks the following Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. An injunction be issued restraining the Defendants, their agents, servants and anyone claiming under them or on its behalf from selling, disposing of by way of auction, and in any manner entering into the said LR 209/1354/(I.R 76442) pending the hearing and determination of the suit.**
>
> **4. Costs be in the cause.**

2. The application was premised upon **Order 40 and Order 51 Rule 1** of the **Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act, Cap 21 laws of Kenya** and all enabling provisions of the law was supported by the Affidavit of even date and Further Supporting Affidavit dated **4th December 2019** sworn by the Plaintiff/Applicant.

3. The 1st Defendant/Respondent **KENYA COMMERCIAL BANK** opposed the application through the Replying Affidavit dated **22nd October 2019** and Further Affidavit dated **27th November 2019** sworn by **SIMON KIOKO MUTUA,** the Business Banker of the Banks **Tala Branch**.

4. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed his written submissions on **14th November 2019** whilst the 1st Defendant/Respondent filed its submissions on **14th January 2020**. The 2nd Defendant/Respondent **JOSEPH MUSEMBI MALA T/A SINGLELINE CONTRACTORS** did not file any reply to the instant application nor did they file any written submissions.

BACKGROUND

5. At the request of the 2nd Defendant the 1st Defendant Bank agreed to disburse a loan facility of **Kenya Shillings 20,000,000** to the 2nd Defendant (hereinafter the "**principal borrower**"). The terms of said facility were contained in the letters of Offer dated **9th March 2015** and **29th March 2017**. The aforesaid loan facility was secured by a third party legal charge for **Kshs.20,000,000** over **LR No.209/3541** (hereinafter "**the charged property**") which property was registered in the name of **Obadiah Mutisya Kitonyi,** the Plaintiff/Applicant herein as well as by a Personal Guarantee and Indemnity executed by the Plaintiff for **Kshs.20,000,000**. The facility was to cover a period of 48 months and was to be repaid by installments of **Kshs.304,305.00** per month.

6. The Bank alleges that sometime in the month of **September 2018** the facility fell into arrears with a total sum of **Kshs.12,318,708.98** being outstanding. The Bank then moved to exercise its statutory power of sale over the charged property.

7. The Plaintiff/Applicant however gives a somewhat different story. According to the Plaintiff he did approach the 1st Defendant Bank seeking a loan facility to enable him purchase a truck. The Plaintiff alleges that it was the Bank who advised the Plaintiff to approach the 2nd Defendant to introduce him (the Plaintiff) to the Bank and that thereafter the Plaintiffs loan facility would be processed. However, that instead of merely introducing the Plaintiff to the Bank, the Applicant alleges that the 2nd Defendant instead used the Plaintiff to guarantee the 2nd Defendants loan facility secured from the same Bank. The Plaintiff faults the Bank Manager for failing to take the time to explain to him the import of the transaction he was entering into. The Plaintiff contends that the purported exercise by the Bank of its statutory power of sale is both fraudulent and illegal hence the present application.

ANALYSIS AND DETERMINATION

8. I have carefully considered the written submissions filed by both parties in this matter as well as the relevant law. The Plaintiff/Applicants is seeking a temporary injunction to prevent the sale of the charged property pending the hearing and determination of the main suit. In **GIELLA –VS- CASSMAN BROWN & COMPANY LIMITED [1973] E.A**, it was held as follows:-

> **"The conditions for the grant of an interlocutory injunction are now I think well settled in East Africa. 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."**

i. Prima facie case

9. The definition of what constitutes a prima facie case was given in the case of **MRAO LIMITED –VS- FIRST AMERICAN BANK LIMITED & 2 OTHERS [2003] KLR**, as follows:-

> **"So what is prima facie case? I would say that in civil cases it 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 as to call for an explanation or rebuttal from the latter."**

> **"…But as I earlier endeavored to show and I cite ample authority for it, a prima facie is more than an arguable case. It is not sufficient to raise issues. 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. In the case of **Nguruman Limited Vs Ian Bonde Nielsen & 2 others (2014) eKLR** the Court outlined the key ingredients of a prima facie case as follows:-

> **"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title. It is enough if he can show that he has a fair and a bond fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."**[own emphasis]

11. The letter of Offer dated **9th March 2015** (Annexture **SKM-1**" to the Replying Affidavit dated **22nd October 2019**), **Clause 8** reads follows:-

> **"8 Security**
>
> **8. The facility shall be secured by the following (the security)**
>
> **8.11 New securities**
>
> **(a) Legal charge of Kshs.20,000,000/= over L.R. NO.209/13541 in the name of Obadiah Mutisya Kitonyi.**
>
> **(b) Personal Guarantee and Indemnity executed by the property owner for Kshs.20,000/=**

12. That letter of Offer was duly executed on behalf of the Bank, and it was also executed by the 2nd Defendant as the "**borrower**" and by the Plaintiff/Applicant as the Guarantor and as the registered proprietor of the charged property. The Plaintiff has not denied executing this letter of Offer.

13. The Plaintiff appears to suggest that he was tricked into releasing his property to Guarantee the loan facility disbursed to the 2nd /defendant. The Plaintiff alleges that the bank manager failed to explain the import of the transaction to him. However, at **Page 12** of the said letter of Offer is a certificate signed by **V.N Nzioki Advocate** confirming that the Plaintiff appeared before him and voluntarily executed the letter of Offer.

14. By voluntarily appending his signature to the letter of Offer the Plaintiff bound himself to the contents of said contract. In any event if he had any doubts or misgivings about the document the Plaintiff ought to have declined to sign the same. Not only did the Plaintiff himself execute the letter of Offer dated **9th March 2015**, the Plaintiffs spouse one **Esther Mukonyo Mutisya** also signed the letter of offer on **4th March 2017** in the presence of **Joel K. Mbaluka** Advocate giving her "**unconditional consent**" to the creation of a charge over the said property. (Annexure **SKM-"1"** to Replying Affidavit dated **22nd October 2019**). In light of this spousal consent the Plaintiff cannot persuade the court that he was unware of the consequences of his actions in presenting his property as security for the said facility.

15. I find that the Plaintiff/Applicant was fully aware of the existence of a Legal Charge for **Kshs.20,000,000** over his property known as **LR NO.209/13541**. He executed the relevant documentation and the Bank even obtained spousal consent for the said charge. In the circumstances the Plaintiff is therefore estopped from now denying the existence of the same.

16. The 1st Defendant Bank states that the facility fell into arrears and the Bank moved to its exercise its statutory power of sale. The Bank Statements annexed to the Replying Affidavit [**SKM-5**] indicate that the loan account was in arrears. The Bank has demonstrated that the requisite statutory notices under the **Land Act 2012** were duly issued and were sent to both the Plaintiff and the 2nd Defendant. Indeed, the Plaintiff does not deny receipt of the said statutory notices nor does he challenge their legality. However, the Plaintiff alleges that the 1st Defendant did not avail to him statements of Account indicating exactly how much was due on the facility. It is trite law that a dispute over accounts does amount to sufficient cause to grant an interlocutory injunction.

17. Further the Plaintiff claims that the Banks purported exercise of its statutory power of sale is fraudulent. A mere allegation of fraud will not suffice. The Plaintiffs beef appears to be with the 2nd Defendant. The Bank had no involvement in and cannot be held hostage by the personal and/or business relationship between the Plaintiff and the 2nd Defendant. These allegations are merely diversionary and are brought in an attempt to cloud issues. The bottom line is that the Plaintiff voluntarily charged his property to the bank. In event of default the Bank is at liberty to exercise its statutory power of sale notwithstanding what issues the Plaintiff may be having with the 2nd Defendant.

I therefore find that the Plaintiff has failed to show a prima facie case.

IRREPARABLE HARM

18. Once a party offers a property as security then that party is fully cognizant of the fact that should said facility fall into arrears then his property is liable to be sold. In the case of **John Nduati T/a Johester Merchants –Vs- National Bank of Kenya Limited (2006) 1 E.A 96**, the Court held that:-

> **"A bank has no money of its own and it is axiomatic that it uses funds to trade with. The Applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the applicant, if any, and that capacity has not been challenged."**

19. Likewise in **THOMAS NYAKAMBA OKONGO -VS- CO-OPERATIVE BANK OF KENYA LIMITED [2012] eKLR**, it was held:-

> **"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgages houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities…Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the Respondent cannot pay damages should it become necessary."**[own emphasis]

20. The value of charged property can be quantified. In event that the suit is decided in favour of the Plaintiff, the value can be assessed and I am confident that the 1st Defendant being a commercial Bank is in a position to compensate the Plaintiff for any loss he may have suffered. This limb of irreparable harm has not been proved.

ii. Balance of convenience

21. The facility in question is in arrears. There is no evidence that the same is being served. Banks are not charitable institutions. Banks are in business to make profits. The facility in question has been disbursed and utilized. The Bank is entitled to recover what is due to it. I find that the Balance of convenience tilts in favour of the Bank.

CONCLUSION

22. Finally, I find no merit in this application. The Notice of Motion dated **29th July 2019** is hereby dismissed in its entirety and costs are

awarded to the 1st Defendant/Respondent.

Dated in Nairobi this 18th day of September 2020.

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Justice Maureen A. Odero