REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL CASE NO. 6 OF 2020

FRANCIS FRAZIER OCHAMI….....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED……...1ST RESPONDENT

KEYSIAN AUCTIONEERS…….....2ND RESPONDENT

RULING

1. The applicant took out a motion on notice dated and filed on 10th February 2020 under sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Rules 10, 15(e) and 16 of the Auctioneers Act; sections 90, 96, 97, 98 and 99 of the Land Act and Articles 40 and 65 of the Constitution.

2. The applicant sought various orders the main order being a temporary injunction restraining the respondents whether by themselves, their servants, agents or anybody claiming through them whatsoever from selling, transferring or dealing in any manner with the applicant's parcel of land Kajiado/Kaputiei North/15216 pending the hearing and determination of the suit.

3. The motion is based on the grounds on its face and the applicant's supporting affidavit sworn on 10th February 2020. The grounds on the face of the motion and depositions in the supporting affidavit reveal that on or about 21st April 2015, 1st respondent advanced a loan facility to the applicant then its employee, of Kenya shillings fifteen Kshs. 15 million. The loan was secured by a legal charge over parcel No. Kajiado/Kaputiei North/15216. The applicant used the loan amount and other funds from other sources to develop the property on which now stand 4 maisonette units of 4 bedrooms each.

4. The loan was to be paid with interest at 3%. Meanwhile, the applicant moved from the 1st respondent's employment on 15th June 2015 to Kenya Commercial Bank Limited. His new employer was to take over his outstanding loan with the 1st respondent.

5. The applicant states that for unknown reasons and without notice to him and while he continued to service the loan, the 1st respondent converted his loan to a commercial loan and started applying commercial rates thus making the loan facility fall into arrears. It is the applicant's case that he requested the 1st respondent to release the mother title to enable him process individual titles for the maisonettes and sell them to offset the loan but the 1st respondent recalled the security before the process was completed.

6. The applicant states that the 1st respondent went ahead and instructed the 2nd respondent to advertise and sell the charged property to recover Kshs. 30,067,004.79 alleged to be outstanding which he cannot understand how it has come about. The applicant further states that he has requested the 1st respondent to render a true and accurate account of his loan status but the 1st respondent has refused to do so.

7. The applicant further states that he is unable to understand how a loan of Kshs. 16,292,205 could shoot to 30,067,004.79 in five years yet he has been making substantial payments towards the loan repayment.

8. He also disputes the value of the property stating that whereas there are 4 maisonettes on the land, according to the notification of sale served by the 2nd respondent, forced sale value of the property is Kshs. 16,875,000/= while market value of the property is given as Kshs. 22,500,000/= which is a serious under value of the property. He deposes that according to a valuation conducted on 15th February 2017 by Trans-country Valuers Limited, the value of one maisonette is Kshs. 3, 500,000/= which translates to Kshs. 25,500,000 for the four units.

9. The applicant maintains that the notification of sale was served on 13th January 2020 even before the 45 days notice had expired. He urges the court to allow his application.

Respondents' response

10. The 1st respondent has filed a replying affidavit by Michael Marwa Mwita, the remedial manager at the collection and recovery department of the 1st respondent. sworn on 3rd March 2020 and filed on 4th March 2020.

11. He deposes that the applicant approached the 1st respondent for a loan facility of Kshs. 16,299,205 a request the 1st respondent accepted; that the facility was secured by a legal charge on parcel No. Kajiado/Kaputiei North/15216 which was executed on 24th April 2015 and registered on 26th May 2015. The deponent states that the applicant also undertook to pay on demand all amounts due and owing. He further states that at the time the applicant applied for the loan, he was an employee of the 1st respondent, and therefore, the loan facility was given under staff loan policy and was to attract interest at 3%. The loan was to be repaid by monthly installments of Kshs. 71,325/=.

12. According to the deponent, the applicant left the 1st respondent's employment sometime in June of the same year and failed to make remittances under the terms of the facility; defaulted in installment payments when due and fell into arrears amounting to Kshs. 27,528,050.95 as at 6th June 2019 and continues to attract interest at 13%.

13. Mr. Mwita deposes that the 1st respondent complied with the law and issued statutory notices to the applicant dated 13th November 2017 and 16th February 2018 under sections 90 and 96 respectively and posted and by personal email; that thereafter, the 2nd respondent was instructed and issued notification of sale dated 23rd December 2019.

14. He states that a forty-five days redemption notice was issued on 6th January 2020 and served on the applicant by registered mail; that the applicant made empty proposals for settlement of the loan arrears and, in particular, made a proposal to sell one of the units on 10th June 2016. Based on that proposal, the 1st respondent surrendered the title deed for the charged property to Messrs Cheptuma & Company Advocates for purposes of change of user and sub-division to allow the applicant sell and redeem the loan but this had not actualized three years later and the loan remained unpaid.

15. According to the deponent, the 1st respondent is not party to the terms of employment between the applicant and his new employer regarding taking over of the loan. He states that upon the applicant leaving of the 1st respondent's employment, the interest rate automatically converted to commercial rates, information known to the applicant and, therefore, the applicant has not shown that he has a prima facie case with a probability of success.

16. The applicant filed a supplementary affidavit sworn on 4th March 2020 and filed on 11th March 2020 responding to the 1st respondent's reply. He deposes that he made several lump sum payments to reduce the loan contrary to the 1st respondent's allegations that paragraph 9 of its replying affidavit; that the 1st respondent unilaterally revised interest rates without notice to him; that the 1st respondent frustrated efforts to have change of user finalized and recalled to title documents before the process had been concluded and for that reason he has a prima facie case.

Applicant's submissions

17. Parties agreed to depose of the application by way of written submissions. The applicant filed his written submissions dated 29th July 220 and filed on 13th August 2020.

18. He submits that he has established grounds for grant of interlocutory injunction pending the hearing of his case. He relies on the well-known case of ***Giella v Cassman Brown & Co. Limited*** [1973] EA 358 on the conditions for granting temporary inunctions. He also relies on ***Mrao v First American Bank of Kenya Limited & 2 Others*** [2003] eKLR for the argument that a prima facie case means on the materials placed before a court, a tribunal properly directing itself would conclude that there is a case of a right which has been infringed by the other party as to call for an explanation or rebuttal.

19. The applicant submits that he has raised a question of interest rate applied to his loan by the 1st respondent and that the loan arrears rose dramatically yet he was servicing the loan. He argues that by varying the interest rate, the 1st respondent breached the terms of the contract signed between the parties. He cites section 84(1) of the Land Act for the argument that interest rate can only be varied where there was an agreement for that, subject to 30 days notice to the chargee setting the new rate. The applicant cites ***Kisimani Holdings Limited & Another v Fidelity Bank Limited*** [2013 eKLR on increase of interest rates.

20. The applicant also argues that the property has been grossly undervalued which he contends has been admitted by the 1st respondent in its replying affidavit. He submits that the chargee has a statutory duty of care to the chargor under section 89 of the Act. He also relies on section 97 of the Act on the duties and obligations of a chargee when exercising its statutory power of sale.

21. The applicant further argues that the 1st respondent undervalued the property yet the property is fully developed with 4 maisonettes without any basis. It is the applicant's case that if the court does not grant the orders sought, he will suffer irreparable loss. He also urges the court to consider the balance of circumstances. He relies on ***Ngurumani Limited v Jan Bonde Nielsen & 2 Others*** [2014] eKLR for the submission that where there is doubt as to adequacy of respective remedies in dangers to either party, the question of balance of circumstance arises.

22. He again cites ***Stars & Garters Restaurant & Another v National Bank of Kenya Limited*** [2019] eKLR quoting ***Amir Suleiman v Amboseli Resort Kenya Limited*** [2004] eKLR where the court underscored that when the court is responding to prayers for interlocutory injunctive reliefs, it should always opt for the lower rather than the higher risk of injustices.

23. The applicant goes on to argue that there is a dispute of accounts over the outstanding arrears since the 1st respondent has never notified him of the interest applied to his loan account. The applicant relies on ***Benson Otieno Ayago v Barclays Bank of Kenya Limited & Another*** [2017] eKLR for the submission that although disputed accounts may not be a basis for granting an injunction, a chargee may be restrained if the chargor shows that in exercising its statutory power of sale, the disputed or amounts claimed are either excessive or tainted with illegal charges and interest.

Respondents' submissions

24. The respondents have filed their written submissions dated 20th August 2020 and filed on 26th August 2020. They submit by way of Preliminary Objection dated 14th February 2020, that this court has no jurisdiction by virtue to Article 162(2) (b) of the Constitution. Their argument is that only the Environment and Land Court should hear this matter.

25. In their main submissions, the respondents contend that conditions for granting injunctions are well settled and rely on ***Giella v Cassman Brown & Company Limited*** (supra). They argue that the application and prayers lack merit since the applicant has not acted in good faith by trying to repay the loan. In their view, he has failed to meet the principles for granting interlocutory inunction.

26. The respondents also rely on ***Mrao v First American Bank of Kenya Limited & 2 Others*** (supra) for the argument that a mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute. They again rely on ***Shimmers Plaza Limited v National Bank of Kenya Limited*** [2015] eKLR for the proposition that no amount of embarrassment, however great, would operate against the exercise of a statutory power of sale.

27. It is submitted that the applicant is a defaulter who is not likely to suffer any harm or loss by performing his contractual duty under a commercial loan agreement. They contend that the 1st respondent is a bank capable of paying damages to the applicant if the court was to adjudge so.

28. They rely on ***Joseph Njagi Mwita & 4 Others v Barclays Bank of Kenya Limited*** [2019] eKLR for the proposition that the bank was at liberty to apply commercial interest rates at its discretion in accordance with the terms of the loan agreement in the staff loan terms and conditions. They further rely on ***Evans Oliver Otwali v Standard Chartered Bank Limited*** [2018] eKLR citing ***Erick J. Makokha & Others v Lawrence Sagini & Others*** [1994] eKLR for the argument that the contract of employment having gone, the fringe benefits of subsidized housing went with it. They rely also on many other decisions and urge the court to dismiss the applicant's application with costs.

Determination

29. I have considered the application, the response and submissions. I have also considered the authorities relied on by respective parties. What is before this court is an application for interlocutory injunction pending the hearing and determination of the main suit. The application challenges the 1st respondent's decision to advertise the applicant's property through the 2nd respondent for sale by public auction in exercise of its statutory power of sale.

30. The applicant has argued that there is a dispute on applicable interest; that the outstanding amount is disputed and that the 1st respondent made it difficult for him to sub-divide and sell some of the houses standing on the charged property to enable him pay off the loan. The applicant also argues that the property has been undervalued. On its part, the 1st respondent has argued that there is no dispute on interest applicable and that it has the right to exercise its statutory power of sale of the charged property. It has also argued that a dispute on the outstanding amount is not a ground for restraining it from exercising its statutory power of sale.

31. The respondent has also argued that this court has no jurisdiction to hear this matter and that only the Environment and Land Court can hear the dispute between the parties being a land matter.

32. The short answer to the respondents' argument that this court has no jurisdiction is that this is no longer a novel argument, given that suits relating to charges and mortgages are heard by this court, being cases that raise cross cutting issues that may fall within the jurisdiction of *either* court. In such a situation, it is proper to adopt the approach advocated by the Court of Appeal in ***Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others***, Civil Appeal No. 83 of 2016 [2017] eKLR. While considering whether a charge over land amounted to *land use* for which the High Court would have no jurisdiction, the Court of Appeal stated:

> ***"****[30]* ***Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to 'whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell'. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well…***
>
> *[31]* ***Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it."***

33. The court of Appeal concluded that charges and mortgages fall within the jurisdiction of this court, stating:

> ***"****[35]* ***[F]or land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted."***

34. Moreover, the decisions the respondents rely on are from courts of concurrent jurisdiction and therefore are not binding on this court. The

preliminary objection is overruled.

35. Regarding the motion this being an application for interlocutory injunction, the conditions for its grant are clear and well settled. In the oft-cited case of ***Giella V Cassman Brown & Company Limited,*** (supra), an applicant must show that he has a prima facie case with a probability of success; that he will suffer irreparable loss not capable of being compensated by way of damages and that the balance of convenience is in his favour.

36. There is no dispute that the applicant, who was an employee of the 1st respondent, was given a loan of Kshs. 16,299,205 by the 1st respondent. The loan which was secured by a legal charge over the applicant's property, parcel No. Kajiado/Kaputiei North/15216. The loan was to attract interest rate of 3% and was to be repaid by a monthly installment of Kshs. 71,325/=.

37. It is also agreed by both parties that shortly after the loan had been advanced, the applicant left the 1st respondent's employment. According to the applicant, the loan was to be taken over by his new employer but he still continued to pay the monthly installments as required. He says he does not understand how the amount jumped to what the 1st respondent claims yet he was repaying the loan.

38. The 1st respondent contends that the applicant defaulted and the loan fell into arrears necessitating it to exercise its statutory power of sale. According to the 1st respondent, the applicant was to repay the loan with interest at 3% but as soon as he left its employment, it applied commercial rates. The applicant disputes this arguing that he was not notified of change of interest payable, thus the 1st respondent applied illegal interest since no notice of change of interest rate was served on him.

39. The law allows a chargee to exercise his statutory power of sale in the event of default by the borrower to repay the loan or financial facility. Section 90(1) of the Land Act, provided that if a chargor is in default of any obligation, that is; he 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, and continues to be in default for one month, the chargee may serve on the chargor a notice in writing requiring him to pay the money owing or to perform and observe terms of the agreement as the case may be.

40. Subsection 90(2) states that the notice to be served should adequately inform the chargor the nature and extent of the default; the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed. The notice should also inform him the consequences to follow if he fails to comply with the notice.

41. Section 90(3) provides for the options available to the 1st respondent as chargee if the applicant does not rectify the situation within the period given. One of the options is to sell the charged property. That is the remedy the 1st respondent has activated and instructed the 2nd respondent to advertise the applicant's property for sale by public auction prompting this application.

42. As already seen, according to section 90(1) and (2), the 1st respondent was required to serve the applicant with a notice calling on him to regularise the default. The applicant argues that the notices were not served while the 1st respondent maintains that the applicant was served with the relevant notices.

43. I have gone through the application and the response. I have also perused the annextures to the affidavits in support of the application and in response thereto. The 1st respondent has attached notices it says were served on the applicant calling on him to redeem the property. There is a letter dated 13th November 2017 issued under section 90(1) of the Act requiring the applicant to rectify default by paying Kshs. 5,319,850.12; letter dated 16th February 2018, being notice of intention to sell the property giving the applicant forty (40) days to redeem the property and 45 days notice issued by the 2nd respondent issued on 6th January 2020. The 2nd respondent also issued notification of sale of the property.

44. According to the applicant, the notification of sale of the property by public auction was served on him on 13th January 2020 before expiry of the 45 days. The applicant's affidavits are silent on whether statutory notices were served on him by the 1st respondent.

45. The critical issue that the applicant has raised in this application is with regard to interest rate. The applicant has argued that although he continues to pay monthly instalments, the amount allegedly outstanding has continued to rise because the 1st respondent is charging illegal interest and or charges. The 1st respondent argues that the applicant's loan was to attract interest at the rate of 3% because it was advanced to the applicant at staff rates. He however left its employment soon after the loan had been advanced. The 1st respondent therefore argues that it applied commercial interest rate on the loan because the applicant was no longer a member of staff. The applicant takes issue with the 1st respondent's action arguing that it did not inform him of change of interest and, therefore, the 1st respondent acted unlawfully. He relies on section 84(1) of the Land Act and decisions to support his argument. The 1st respondent on its part contends that it was right to apply commercial interest rate and that the applicant was aware of this.

46. The applicant was an employee of the 1st respondent when he took the loan which was to attract interest of 3%. There is no denial that he left the 1st respondent's employment shortly after the loan was advanced to him and joined Kenya Commercial Bank Ltd. According to the applicant, his new employer was to take up the loan from the 1st respondent. That, however, is an issue between him and his new employer and cannot be thrown at the 1st respondent.

47. Section 84 (1) of the Act provides that;

> ***"(1) Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee,—***

(a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and

(b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge." (emphasis)

48. The law is clear that where interest is variable, the chargee must give notice to the chargor before varying the interest. The question that arises is whether the interest rate was variable and if so, whether the relevant notice was served. The applicant states that there was no notice. The 1st respondent has not been categorical on whether the applicant was notified or whether such notice was not required.

49. I have perused the documents filed by parties in support of their respective positions. The letter of offer dated 21st April 2015, states that interest rate to be applied on the loan is 3% but the 1st respondent ***reserves the right to change the rate of interest upon giving thirty (30) days notice in writing to the applicant.*** The charge instrument which formed the basis of the loan agreement between the parties, also states at paragraph 3.1.1, that interest payable is 3%. Under Paragraph 3.1.2, the 1st respondent reserved the right to change interest rate and under paragraph 3.1.4, it undertook to serve a thirty (30) days notice as required by section 84(1) prior to varying the interest rate.

50. From both the letter of offer and the charge instrument, the 1st respondent was under obligation to serve the applicant with notice on change of interest rate which the applicant argues the 1st respondent did not do. The applicant therefore raises a valid issue of the interest rate charged on his loan and whether a notice was served as required by both the charge and the law.

51. Variation of interest rate must have had a bearing on the repayment of the applicant's loan and the amount outstanding. On that basis, the applicant raises a prima facie case that calls on the 1st respondent to rebut the applicant's contention that the 1st respondent did not comply with the law and breached his right to know the interest to be applied on his loan.

52. In terms of the decision of ***Mrao v First American Bank of Kenya Limited & 2 Others*** (supra), the Court of Appeal stated:

"So what is a 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."

53. Similarly, in ***Nguruman Limited v Jan Bonde Nielsen & 2 others*** (supra), the Court of Appeal stated:

"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."

54. The applicant has demonstrated, prima facie, that there is an issue that the court should determine during the hearing, namely; what interest rate has been applied to his loan and whether the law was complied with in varying the interest.

55. Even where an applicant demonstrates that he has a prima facie case, the court must go further and determine whether the applicant will suffer irreparable that cannot be compensated by way of damages if an interlocutory injunction is not granted. On this the Court stated in the ***Nguruman case:***

"[T]he applicant must establish that he "might otherwise" suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot "adequately" be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy."

56. In the present case, can it be said that the applicant will suffer irreparable injury that is incapable of being compensated by way of damage? I think not. The intended sale involves a parcel of land on which stand four maisonettes. The value of the land and developments thereon can be ascertained. In that regard therefore, I do not think the applicant will suffer irreparable injury that cannot be adequately be compensated through damages.

57. In coming to this conclusion, I am guided by the decision of the Court of Appeal in ***Jacob Ochieng' Muganda v Housing Finance Company of Kenya Limited*** [2002] eKLR, that if there is any irregularity in the conduct of the auction the applicant would be entitled for damages against the auctioneer pursuant to section 26 of the Auctioneers Act. That would also apply if the irregularity or mistake falls on the chargee.

58. I should also point out that in my view, the applicant admitted the fact that the debt is due and that was why he wanted to sell some of the maisonettes to pay the loan and blames the 1st respondent for recalling the mother title before the process was complete. Admittedly, the loan was not being serviced and therefore this court should not granted an injunction to restrain a chargee who has put in motion the process of exercising its statutory power of sale unless there are compelling reasons to do so.

59. Regarding balance of convenience, the applicant has not proved that the balance tilts in his favour. The loan amount continues to attract

interest thus the amount could very well outstrip the value of the property. This means if the respondent is to be restrained from exercising its statutory power of sale until the suit is determined, it may easily not be able to recover the outstanding amount together with accrued interest by the time the suit is determined. There is no guarantee that the value of the property will be sufficient to cover the outstanding loan then. I therefore find that the balance of convenience tilts in favour of the 1st respondent since it can pay the value of the property if the applicant's suit succeeded.

60. In the circumstances, the application dated 10th February 2020 is declined and dismissed. Costs in the cause.

Dated, Signed and Delivered at Kajiado this 27th day of November, 2020.

E. C. MWITA

JUDGE