IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E240 OF 2020

BETWEEN

ELITE INTELLIGENT TRANSPORT SYSTEMS LIMITED.....PLAINTIFF

AND

GULF AFRICA BANK LIMITED.....1ST DEFENDANT

GARAM AUCTIONEERS .....2ND DEFENDANT

RULING

Introduction

1. The Plaintiff has approached the court by a Plaint accompanied by a Notice of Motion dated 8th July 2020 made, inter alia, under **Order 40 Rule 1, 2,3** and **4** of the ***Civil Procedure Rules*** seeking the following orders:

> 1. [Spent]
>
> 2. [Spent]
>
> 3. This Honourable court be pleased to issue an order of temporary injunction restraining Defendants either by themselves, employees, servants or agents from proclaiming and or otherwise commencing and or proceeding with any realization process in respect of all the plaintiff's assets, including but not limited to the plaintiff's equipment, motor vehicle, machines and dealing with the property known as LR No. 1160/339(Original Number 1160/178/3) pending the hearing and determination of this suit.
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> 4. [Spent]
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> 5. This Honourable court be pleased to issue an order of temporary injunction restraining the 1st Defendant from debiting any of the Plaintiff's account domiciled with itself, Kshs. 2,437,094.00 being the 2nd Defendant's auctioneer fees, pending the hearing and determination of the suit.
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> 6. That such other or further orders as the court may deem fit to grant.
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> 7. Costs of the Application be provided for.

2. The application is supported by two affidavits of Patrick Kibaiya, a Director of the Applicant, sworn on 8th July 2020 and 4th August 2020 respectively. It is opposed by the Defendants through the replying affidavit sworn by the 1st Defendant's Legal Officer, Lawi Sato, sworn on 20th July 2020.

3. The facts leading to the dispute are largely common cause and can be gleaned from the pleadings and the various depositions sworn on behalf of the parties. Moreover, the correspondence between the parties, which forms the basis of the dispute, is not contested.

4. On 22nd May 2017, the Plaintiff was awarded a contract by the Kenya Rural Roads Authority ("KeRRA") for upgrading to bitumen standards and maintenance of the *Mikindiri-Kunati-Kitithine road* in Meru County ("the Project") for a period of 24 months.

5. In order to finance working capital, purchase motor vehicles and equipment for the Project, the Plaintiff applied for and was granted facilities to the tune of Kshs. 250,000,000.00 by the 1st Respondent ("the Bank") secured by a legal charge for Kshs. 133,000,000.00 over LR No. 1160/339 (Original No. 1160/178/3) in the name of the Plaintiff, joint registration of motor vehicles being financed by the Bank and directors' joint and several Guarantees. The facilities were contained in various letters of offers dated 29th January 2018, 22nd May 2018, 29th August 2018, 25th September 2018, 17th July 2019 and 12th March 2020.

6. The Plaintiff was unable to service the facilities as agreed leading to default. The Bank issued to the Plaintiff a 90-day statutory notice dated 28th June 2019 under **section 90(1)** of the ***Land Act, 2012*** and **section 56(2)** of the ***Land Registration Act, 2012*** evincing its intention to exercise its statutory power of sale in respect of the charged property. It further issued a 40-day notification of sale dated 7th October 2019 pursuant to **section 96(2)** of the ***Land Act***.

7. In January 2020, the Plaintiff approached the Bank for indulgence on the ground that KeRRA has delayed in making payments to it. In order to deal with the request, the Bank wrote to KeRRA to confirm validity of the contract and confirm the amount outstanding to the Plaintiff. KeRRA responded by a letter dated 2nd March 2020 confirming the Project was ongoing and that the Plaintiff had only completed 8.08%. After reviewing the proposal, the Bank wrote to the Plaintiff a letter dated 20th January 2020 requesting the Plaintiff to provide additional security. Following discussions, the Bank issued a letter of offer dated 12th March 2020 restructuring the facility. On 4th May 2020 and 2nd June 2020, the Plaintiff once again requested the Bank to restructure the facilities. The Bank responded to the request by its letter dated 25th June 2020 seeking certain documents to enable it consider the request. In addition, the Bank sent its representative to visit the site.

8. The Bank did not accept the Plaintiff's request for a restructure and by a letter dated 3rd June 2020, it demanded payment of Kshs. 178,007,147.00 failing to which it would proceed to realize the securities through the 2nd Defendant ("the Auctioneer"). The Auctioneer issued a Proclamation Notice for the motor vehicles. It is this action that has precipitated this suit and application.

9. The parties agreed to dispose of the application by written submissions filed by both parties.

Applicable principles

10. The principles upon which the court is required to apply in determining the Plaintiff's case are not disputed. In ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR**, the Court of Appeal reiterated the settled principles in ***Giella v Cassman Brown*** **[1973] EA 358** as follows:

> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> (a) establish his case only at a prima facie level,
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> (b) demonstrate irreparable injury if a temporary injunction is not granted, and
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> (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> 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.

11. As to what constituted a prima facie case, the Court of Appeal in ***Mrao Ltd v First American Bank of Kenya Limited and 2 Others*** **[2003] eKLR** explained that 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 to call for an explanation or rebuttal from the latter."*

Whether the Plaintiff has established a Prima Facie case.

Plaintiff's arguments

12. From its counsel's submissions, the Plaintiff's case is based on the fact that the proceeds from KeRRA were to be channeled directly to the Bank to settle its indebtedness but because of supervening events namely; heavy rains that stalled the Project and the COVID-19 pandemic, frustrated completion of the Project and that the Plaintiff is entitled to relief from this court. Counsel for the Plaintiff urged the court to look beyond the literal and strict interpretation of the law and take into account the unique circumstances of the Plaintiff's case and apply equity. Counsel relied on the decision of the court in ***Al-Jalal Enterprises Limited v Gulf African Bank Limited*** **[2014] eKLR**.

13. The Plaintiff also submitted that the Bank made a representation that parties herein are bound by the rules and values of Islamic Banking and as such, transactions should be reviewed based on the *Musharaka system and Financial Distress rule*.

14. Counsel for the Plaintiff submitted that the Bank, through their various letters of offer and correspondence made it clear that the facility would be serviced by the contract proceeds thus making the Project an integral part of the transaction between the Plaintiff and the Bank. It was submitted that from the contract and surrounding facts and circumstances including the conduct, the express and implied terms of the contract, that the validity of the project and the proceeds therefrom were integral to the advancement, restructure and tenure of the facility.

15. In order to support this argument, the Plaintiff pointed out that based on the letter of offer dated 29th January 2019, the tenure of the facility was based on the Project period and the issuance of the completion certificate by KeRRA. Second, the letters of offer and the restructure required an undertaking from KeRRA that the Project proceeds would be routed through the Bank. That before restructuring the facility, the Bank demanded from KeRRA a letter verifying the validity of the Project on 22nd March 2020 and that the Bank relied on its own officer to survey the progress of the project before declining to restructure the facility.

16. Counsel cited ***Chitty on Contracts Vol. I (General Principles), 2009 Ed.*** Para. 13003 to support the proposition that the court should be prepared to imply certain terms in contract if it is necessary to **give business efficacy to the contract. The Plaintiff therefore urged that it** was always an expressed and implied term that the facility would be serviced by the Project proceeds. Consequently, when the Project was frustrated by supervening events, the Bank was estopped from reneging on this position and expecting the Plaintiff to service the facility in any other manner other than what was contemplated.

17. The Plaintiff also relied on the principles of the Islamic banking. It contended that the facility was a *Musharaka* under which the Bank proposed a partnership system in the Project which would have the Bank's equity reduced by a method proposed by the Bank. The Plaintiff submitted that reduction of the Bank's share would be from the Project proceeds. As the Bank made representation expressly and by conduct, the Plaintiff further argued that when the Project stalled because of supervening events, the Bank assured the Plaintiff that it would apply the Financial Distress Rule and grant it an extension without any penalty but the Bank reneged on this promise.

18. Additionally, the Plaintiff relied on the doctrine of estoppel and called in aid the provisions of **section 120** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)*** and the decision of the Court of Appeal in ***John Mburu v Consolidated Bank of Kenya*** **[2018] eKLR** to argue that the Bank was estopped from calling in the facility.

19. The Plaintiff also submitted that the Bank could not realise its securities as it issued irregular and unlawful notices. It contended that the Bank violated **section 67** of the ***Movable Property Security Rights Act*** hence it could not purport to proclaim against the Plaintiff and debit auctioneers' fees from the Plaintiff's Account based on those notices.

20. The Plaintiff also submitted that the Bank breached **sections 90** and **96** of the ***Land Act*** as the 40-day statutory notice dated 7th October 2019 was issued while there was a 6 months' tenor/moratorium through the restructure dated 17th July 2019, meaning that there was no lawful demand for payment and no lawful reason for the issuance of the statutory notice.

Defendants' Arguments

21. The Bank's position is that the Plaintiff has not established a prima facie case with a probability of success. It pointed out that there is no dispute that the advances were made in accordance with the facilities and that the sums advanced have not been paid and that the Plaintiff has expressly admitted default. It maintained that the Plaintiff was not entitled to an injunction as was held in ***National Industrial Credit Bank and Another v Golden Tea Traders Limited*** **[2019] eKLR**.

22. The Bank refuted the Plaintiff's argument that repayment of the facilities was to be made by payments from KeRRA. It submitted that the Plaintiff does not allege or argue that the facility letters and securities created under them do not preclude repayment through any other means or realization of the securities. It further submitted that this argument is inconsistent with the express terms of the facility agreements and legal charges which gives the Bank the right to realise those securities notwithstanding that KeRRA has not made payment to the Plaintiff.

23. The Bank contended that the representations relied on by the Bank were expressly excluded by the terms of the facility letters and the Plaintiff could not make any claims or rely on representations that were inconsistent with the written facility letters and charges. The Bank further contended that the court cannot imply terms that are manifestly inconsistent with the written terms of the agreements. To support this argument, Counsel for the Bank cited several cases including ***Dominic Charles Muthuuri v National Industrial Credit Bank Ltd*** **[2003] eKLR**, ***Tom Otieno Odongo v Cabinet Secretary Ministry of Labour Social Security Services and Another*** **[2013] eKLR** and ***Givan Ogallo Ingari and Another v Housing Finance Company of Kenya Limited*** **[2007] eKLR**.

24. The Bank also submitted that the Musharaka principles relied on by the Plaintiff are of no consequence in view of the clear provisions of the facilities and legal charges. It urged that the rule against parol evidence excluded the application of those principles and representations. The Bank cited the case of ***Prudential Assurance Company of Kenya Limited v Sukhwinder Singh Jutley and Another*** **[2007] eKLR** to support its position.

25. The Bank denied that the notices issued in order to realise the securities were irregular or illegal. It pointed out that the notices in respect of the charged land were issued in 2019 and no complaint was raised about their validity until this suit was filed. It submitted that the restructures specifically reserved the rights that had accrued and thus could not impair or void a statutory notice that had been validly and properly issued. In respect of the moveable property, the Bank submitted that the Auctioneer, in issuing the proclamation allowed for 7 days before taking possession of the assets and since the assets could not be collected before the 7 days expired, the notice was proper and valid.

26. The Bank submitted that the COVID-19 pandemic could not be a basis for the grant of any injunction on the basis that prior to the pandemic, the Plaintiff has been in default and had been accommodated by various restructures. The Bank submitted that the Plaintiff moved the court in the expectation that it would be paid by KeRRA by the end of October 2020 and if the court was minded to grant an injunction then exceptionally, it should be granted only up to the end of October 2020.

Resolution

27. This is a case where the Plaintiff does not dispute the facilities or that it is indebted to the Bank. In fact, the Plaintiff expressly admits its indebtedness. The grounds upon which the Plaintiff anchors its application for injunction are that it was an implied term of the agreement

that servicing the facility was conditional on receipt of money from KeRRA and that the Bank had made certain representations that were based on the prevailing circumstances and on the fact that the facilities were underpinned by the Musharaka principles.

28. Unfortunately, the Plaintiff was unable to point to any specific clause in the letter of offer and the charge documents showing or providing that repayment of the facility was based on receipt of payment from KeRRA. On the contrary, each of the letters of offer have a specific clause that provides for the manner of repayment. Clause 5.1 which is common to the letter of offer states as follows:

> 5.1 The facility shall be repaid over a period stipulated in the table above by debit of the Customer's account held by the Bank, with the first instalment due 3 months after disbursement of the Facility. If the payment falls due on a non-working day the payment shall be effected on the next working day and shall accrue profit as normal.

The aforesaid provision is further buttressed by the following Clause 10.1 which relates to events of default which entitled the Bank to exercise any of its remedies. It states as follows:

> 10.1 The Customer does not pay on the due date any amount payable under or pursuant to this Letter or the Security Documents at the place and in the currency in which it is expressed to be payable.

29. From the express provision of the Letters of Offer it is clear that that the parties did not intend that the servicing of the facility was tied to payments from KeRRA. I have also studied the charge document and there is nothing in it that ties the Bank's hand to KeRRA. In light of the aforesaid provisions, the court cannot imply other terms that are inconsistent with the express terms of the parties' agreement.

30. The Plaintiff's position is also inconsistent with the position taken in its various appeals to the Bank to grant it indulgence. For example, in the letter dated 20th January 2020, the Plaintiff made the following request to the Bank, *"We refer to your offer to us extending the facility for 18 months with 6 months payment installments starting from 20th January 2020. We regret we are not able to make the first installment this month due to a delay in payments …..".* In another letter dated 2nd June 2020, the Plaintiff stated, *"We are therefore kindly requesting you to reschedule our repayments to effective 30th September 2020 and thereafter every 180 days as earlier scheduled."*

31. The Plaintiff's own correspondence negates the argument it is now making. I therefore reject the Plaintiff's argument that servicing of its loan was tied to payments by KeRRA. In the circumstances, the court cannot imply a term contrary to the agreements. It is also true that the facilities are governed by Sharia Principles and that part of the facilities offered were based on the diminishing Musharaka. However, for purposes of this case and the application for injunction, there is nothing in the letter of offer or charge that limits the Bank's remedies. As I have shown above, the letters of offer provide for events of default which entitle the Bank to realise its securities. The charge document provides that in the event of default, the Plaintiff is entitled to sell the charged property.

32. Since the Plaintiff admits its indebtedness, the next issue is whether the Bank is entitled to realise the securities. As regard the charged land, the condition precedent for exercising the statutory power of sale to issue a notice under **section 90** of the ***Land Act***. The Plaintiff admits, at paras. 12 of the Amended Plaint, that it received the 90-day statutory notice dated 28th June 2019 issued under **section 90(1)** of the ***Land Act***. In addition, the Bank issued the Notification of Sale dated 7th October 2019 under **section 96(2)** of the ***Land Act***. The Plaintiff has not disputed those notices which it in fact acknowledged. I therefore find and hold that once default was admitted and the statutory notice served, the statutory power of sale has accrued.

33. I agree with the submission by counsel for the Defendants that the restructuring of the facilities did not invalidate the already accrued statutory power of sale. The accommodations given by the Bank to the Plaintiff are without prejudice to the already accrued right.

34. Turning to the moveable properties, the Plaintiff denies that it received the Demand Notice dated 3rd July 2020. The Applicant contends that there is no Certificate of Postage to prove that mode of service which is in non-compliance with **section 67** of the ***Movable Property Security Rights Act*** which states as follows:

> **67. Relief for non-compliance**
>
> (1) If there is a default with respect to any obligation, the secured creditor shall serve on the grantor a notification, in writing or in other form agreed between the parties, to pay the money owing or perform and observe the agreement as the case may be.
>
> (2) The notification required under subsection (1) shall adequately inform the recipient of the following matters—
>
> a. the nature and extent of default;
>
> b. if the default consists of non-payment, the actual amount and the time by the end of which payment must be completed;
>
> c. if the default consists of the failure to perform or observe any covenant, express or implied, in the agreement, the act the grantor must do or desist from doing so as to rectify the default and the time by the end of which the default must have been rectified;
>
> d. the consequence that if the default is not rectified within the time specified in the notification, the secured creditor will proceed to exercise any of the remedies referred to in section 65; and
>
> e. the right of the grantor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may—

a. sue the grantor for any payment due and owing under the agreement;

b. appoint a receiver of the movable asset;

c. lease the movable asset;

d. take possession of the movable asset;

e. sell the movable asset; or

f. pursue any of the remedies under section 65.

(4) The Cabinet Secretary may prescribe the form and content of a notification to be served under this section.

35. It is the burden of the Bank to demonstrate that it has served the notice in the absence of an admission by the Plaintiff (see ***Nyagilo Ochieng and Another v Fanuel Ochieng and 2 Others*** **[1995-1998] 2 EA 260**). Further, the notice of repossession issued by the Auctioneer does not meet the requirements of **section 67** of the ***Movable Property Security Rights Act***. In the circumstances, an injunction would ordinarily issue. However, since the Plaintiff admits indebtedness, it would be inequitable to restrain the Bank from exercising its statutory and contractual right pending the hearing and determination of the suit. The Bank should have the opportunity to regularize its position. I will therefore grant the bank the opportunity to regularize its position by serving the notice on the Plaintiff.

36. The Plaintiff pleaded that it was unable to complete the Project because of heavy rains and due to the COVID-19 pandemic. While I am entitled to take judicial notice of the difficult operating environment in which the Plaintiff is operating, I am also alive to the fact that the Bank has granted the Plaintiff accommodation on several occasions. The court cannot compel the Bank to accept the Plaintiff's proposals to restructure the facilities by restraining it from exercising its legal remedies as this would amount to re-writing the parties bargain (see ***Muigai Enterprises Limited v Kenya Commercial Bank Limited*** **[2016] eKLR**). I would only point out that under **section 103** of the ***Land Act***, a chargor is entitled to seek relief from the court against any chargee from exercising any of its statutory remedies under **section 90** thereof and the court may grant any of the reliefs under **section 104**. These provisions have not been invoked.

37. Save on the issue of notice in respect of the moveable properties, I find and hold that the Plaintiff has not established a prima facie case with a probability of success.

Whether damages are an adequate remedy and balance of convenience

38. Following the dicta in ***Nguruman Limited v Jane Bonde Nielsen and 2 Others*** **(Supra)**, once the applicant fails to establish a prima facie case with a probability of success, the inquiry comes to an end. However, and for the benefit of the parties I shall consider the requirements.

39. In respect of the charged property, the question whether damages are an adequate remedy is answered by **section 99 (4)** of the ***Land Act*** which provides that:

> **99. (4) A person prejudiced by unauthorized, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.**

40. Further, the parties always contemplated that the suit properties would be sold in the event of default hence damages are an adequate remedy in the event the suit ultimately succeeds. In view of its admitted indebtedness, the balance of convenience is against the Plaintiff as the debt will continue to escalate thus eroding the value of the security.

41. Before I conclude, let me touch on the issue of the auctioneer's fees raised in prayer 5 of the application. Granting the same would amount to a full and final determination of the matter yet pleadings have not closed and the issues are not yet ventilated properly by the parties. As this is a money claim, I am satisfied that in the event the court ultimately finds that the sum was improperly debited to the Plaintiff's loan account, the Bank will be directed to reverse the entry. There is no reason to believe that the Bank will not be in a position to comply with such an order.

Disposition

42. I allow the Notice of Motion dated 8th July 2020 on the following terms:

a. The Defendants are hereby restrained from repossessing the motor vehicles registered in the joint names of the Plaintiff and the Defendants until such time as the Plaintiff is served with a notice in compliance with **section 67** of the ***Movable Property Security Rights Act***.

b. The Plaintiff shall bear half the costs of the application.

DATED and **DELIVERED** at **NAIROBI** this **20th day of NOVEMBER 2020.**

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Muraguri instructed by Muraguri, Muigai and Waweru Advocates for the Plaintiff.

Mr Ogunde instructed by Walker Kontos Advocates for the Defendants.