



**REPUBLIC OF KENYA**

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

**COMMERCIAL SUIT NO. 2 OF 2018**

**MORRIS MUNAMEZA ISIYE.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**EPHY IMBALLI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**KAMADEP GUEST HOUSE LIMITED.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**AFRICAN BANKING CORPORATION LTD.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff's Amended Notice of Motion dated 24<sup>th</sup> May 2018 sought an interlocutory injunction to restrain the Defendant from disposing of, selling or auctioning the suit property **L.R. NO. KAKAMEGA MUNICIPALITY BLOCK/111/10**.

1. Secondly, the Applicants sought an order that Accounts be taken so as to determine the correct amounts.
2. Thirdly, the court was asked to order that the "Loan Overdraft" be restricted in line with the **Consumer Protection Act**, the current economic time, and the banking practice, to enable the Plaintiffs pay the loan by way of instalments.
3. It was the Plaintiffs' case that the Defendant had expressed an intention to auction the suit property without due regard to the proper procedures and the law.
4. In particular, the Defendant is said to have failed to give the requisite statutory notices.
5. In any event, the Plaintiffs pointed out that they had been servicing the overdraft facility religiously.
6. Notwithstanding the efforts made by the Plaintiffs to service the facility, the said facility had kept on increasing, instead of decreasing.
7. The Plaintiffs attribute the increase in the facility to illegal penalties, unreasonable interest rates and some strange debits which were being charged by the defendant.
8. It is the Plaintiff's case that they had already paid a substantial portion of the facility, and that therefore the outstanding balance did not exceed Kshs 500,000/=.
9. The other issue raised by the Plaintiffs is that the Defendant had caused the suit property to be seriously under-valued.
10. In that respect, the Plaintiffs pointed out that the suit property had now been valued at Kshs 85 Million, whilst four (4) years ago, the Defendant had had the property valued at Kshs.130 Million.
11. On their own part, the Plaintiffs' view was that the property was currently valued at Kshs 350 Million.
12. In its answer to the application, the Defendant has exhibited documents which show how the loan account in issue had been operated.
13. It is the Defendant's case that the statements of account show that the Plaintiff was a "serial defaulter".
14. The Defendant also exhibited correspondence exchanged between its advocates and the Plaintiffs' advocates.

15. By a letter dated 13<sup>th</sup> December 2016, the bank's lawyer told the Plaintiffs that as a result of their failure to make scheduled payments, the outstanding amount was Kshs.20,641,904/05.
16. As the Plaintiffs' lawyers responded to that letter on 22<sup>nd</sup> December 2016, that confirms that the Defendant's letter reached them.
17. It is notable that the Plaintiffs did not dispute the figures cited by the bank.
18. If anything, the Plaintiffs appear to have acknowledged that they were in arrears, and they promised to clear the arrears.
19. By a letter dated 15<sup>th</sup> March 2017, the Plaintiffs' lawyers informed the Defendant's lawyers that they had cleared all the arrears as at 10<sup>th</sup> March 2017.
20. By the same letter, the Plaintiffs suggested that the loan repayment be rescheduled, so as to allow them remit monthly payments of Kshs 280,000/=.
21. The Defendant did not accept the said proposal.
22. That leads me to the question concerning the agreed monthly instalments.
23. Pursuant to the particulars of Schedule 1, to the Letter of Offer dated 20<sup>th</sup> January 2015, the "*Instalment Amount*" was Kshs 583,663/=.
24. However, Schedule 2, to the same Letter of Offer cited an "*Instalment Amount*" of Kshs 380,625/=.
25. In order for the Plaintiffs to be honouring the terms of the contracts which they executed with the Defendant they would need to demonstrate that every month, they were remitting sufficient funds.
26. A perusal of the Statements of Account reveal a failure, in several instances, in remitting payments which were sufficient to meet the monthly instalments.
27. On a prima facie basis, there was a default on the part of the Plaintiffs.
28. And, pursuant to the Terms of the Contract, each default would trigger an obligation upon the Plaintiffs, to pay interest by way of liquidated damages at the rate of 36% per annum.
29. As far as the Plaintiffs were concerned, it was most unreasonable for the bank to require them to pay such high rates of interest.
30. Whilst there is no denying that interest at the rate of 36% per annum is high, the court notes that the parties appear to have entered into a contract which provided for the said rate.
31. Therefore, I hold the considered view that, on a prima facie basis, that aspect of the Plaintiffs' case does not appear to have a probability of success.
32. The Plaintiffs have alluded to the prevailing tough economic times prevailing in the country; and they have attributed their financial challenges to the said tough times.
33. Any party who makes an assertion on a matter of fact has the evidentiary burden to prove his said assertion.
34. In this case, the Plaintiffs did not lead any evidence to prove the existence of tough economic times in the country.
35. On the other hand, the said tough economic times were not a matter of such common notoriety, that would be a foundation for a finding about which the court could take Judicial Notice.
36. The fact that the Plaintiffs requested the bank to reschedule the facility, so that the monthly installments could be reduced to Kshs 280,000/= is a clear indication that the Plaintiffs were well aware that the only way that the contract could be varied was through a mutual agreement.
37. It would therefore follow that just because the borrower's financial ability had been eroded by difficulties prevailing in the country, that would not become a justification for repaying less than the agreed instalments.
38. I have also closely examined the Notices issued by the Defendant, and I find, on a prima facie basis, that they appear to be in compliance with the law.
39. In other words, it does appear that prior to the issuance of instructions to the auctioneer, the bank had issued all the requisite notices to

the charger and the borrower.

40. As to the question of ascertaining the exact amount which is still due and owing, it is now well established that such an issue cannot be the basis for the grant of an interlocutory injunction.
41. If the courts were to issue interim injunctions to stop the realization of securities, just because there was an unresolved dispute over the outstanding balance, it would make a mockery of the chargee's rights, because borrowers or chargors would only need to come up with reasons for challenging the outstanding balances.
42. When a borrower runs into difficult or turbulent financial circumstances, there is a likelihood that defaults would arise. In such a scenario, it would be understandable for the borrower to approach the lender at the earliest possible opportunity, with a view to discussing the possibility of rescheduling the loan.
43. In this case, the Plaintiffs did make a proposal to the Defendant, to have the monthly instalment amounts reduced.
44. Whilst a reduction of monthly instalment rates may, if agreed upon, constitute one aspect of the rescheduling of a financial facility, it is not, of itself, a rescheduling of the facility.
45. Nonetheless, whilst the rescheduling of a facility could provide a win-win situation for the borrower and the lender, the courts cannot compel the parties to agree to a rescheduling. That is because the courts do not and cannot re-write the contracts between parties.
46. On the question of the Valuation of the suit property, the Plaintiffs have accused the bank of grossly under-valuing it. The basis for that contention is that the Plaintiffs believe that the property is currently valued at Kshs 350,000,000/=, whilst the Defendant has had the property valued at Kshs 85,000,000/=.
47. The gap between those two values is so large, that if they could be verified from cogent evidence, that would be a clear pointer to a real problem.
48. On its part, the bank has exhibited the report of the person who valued the property at Kshs 85,000,000/=.
49. However, the Plaintiffs have not made available any report from a Professional Valuer, from which the court could gauge the figure cited by the Plaintiffs. In the absence of a valuation report, I find, on a prima facie basis, that the Plaintiffs have failed to demonstrate that the suit property is currently valued at Kshs 350,000,000/=.
50. Having so found, it ought to have been possible to dismiss the Plaintiffs' assertion about the alleged gross under-valuation of the suit property.
51. However, the court's attention has been drawn to a Valuation which was reportedly conducted at the bank's instance in the year 2013.
52. The Plaintiffs said that in 2013, the suit property was valued at  
  
Kshs 130,000,000/=.
53. The Defendant has not challenged that statement. I therefore presume that the said statement is factually accurate.
54. In my considered view, unless the Defendant provided a satisfactory explanation for the large drop in the value of the suit property, (and so far, no such an explanation has been tendered); the Plaintiffs would be entitled to conclude that a valuation in the sum of  
  
Kshs 85,000,000/= was a gross under-valuation.
55. I therefore find that if the Defendant were to proceed with the process of the realization of the suit property, on the basis of the valuation report which stated that the property was worth Kshs 85,000,000/=, that would expose the Defendant to the real risk that it may well be required to compensate the Plaintiffs.
56. In the event, is there a basis for granting an injunction to restrain the bank from realizing the security?
57. My answer is in the negative.
58. I so hold because, upon a strict interpretation, the bank has undertaken the exercise of valuation of the security.
59. But the court cannot ignore the fact that, on a prima facie basis, the value assigned to the suit property appeared to be much lower than its actual value.
60. In the circumstances, although I decline to grant an injunction to restrain the Defendant from realizing the security until the suit was heard and determined, I direct the Defendant to undertake a fresh valuation of the suit property before taking further steps to realize the security.

61. Otherwise, for all intents and purposes, the Plaintiffs' application is dismissed, with costs to the Defendant.

**DATED,SIGNED and DELIVERED at KISUMU this 23<sup>rd</sup> day of January 2019**

**FRED A. OCHIENG**

**JUDGE**