THE REPUBLIC OF KENYA,

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 25 OF 2019

SHENG SHUANG QUARRY LIMITED.....APPLICANT

VERSUS

NATIONAL INDUSTRIAL & CREDIT BANK LTD.....RESPONDENT

RULING

1. The Applicant filed this application for a temporary injunction citing sections 1A, 1B(I) and 3A of the Civil Procedure Act, cap 21 laws of Kenya, and Order 40 rules 1a, 2i,2 (4) (i) (2), 2, 3 and Order 51 Rule 1 of the Civil Procedure Rules for a temporary injunction to restrain the Respondent/Defendant by themselves, its servants, agents and or employees, or otherwise howsoever from exercising its power of sale over the plaintiff/applicants property known as LR NO **28617 (I.R 129519) Mavoko** situate at Machakos County as per notification contained in the letter dated 14.8.2019 pending the hearing and determination of this suit or until any further orders and an order that the Defendant/Respondent withdraws from the possession of the plaintiff/applicants property known as LR NO **28617 (I.R 129519) Mavoko** situate at Machakos County . It is also for costs of the application to be provided for.

2. The application is further supported by the affidavit of David Muigai Nganga. The grounds of the application as disclosed in the Chamber Summons are as follows:

i. The Respondent/Defendant's notice of sale of the suit property written on 14th August, 2019 and served on the plaintiff/applicant and its directors under Section 96(2) of the Land Act 2012 for an unpaid amount of Kenya shillings 412,550,175 is premature and illegal and unlawful and amounts to clogging and fettering the applicants right of redemption contrary to Section 85(2) (b) and 89(2) of the Land Act, 2012.

ii. The Respondent/Defendant is guilty of underhanded-ness as it has defrauded the plaintiff/applicant of more than Kshs 13,514,277.19 by mysteriously not indicating on the loan account of the Applicant/Plaintiff.

iii. The applicant borrowed Kshs 458,830,600/- from the Defendant/applicant between 2014-2018 and provided as securities in forms of:

a) Supplemental and fixed charge Kshs 247.4 m over the suit property located in Katani, Machakos County.

b) All fixed and floating debenture of Kshs 247.4m on company assets of the applicant.

c) Directors' personal guarantees of Kshs 247.4m each.

d) Hire purchase agreement, joint registration and comprehensive insurance covers with banks interest noted over the vehicles.

e) Corporate guarantee by the applicant of Kshs 500,000/- to secure the credit card limits.

iv. The purpose of the loan was to finance the purchase, installation and commissioning of a new quarry plant and over the period the applicant paid Kshs 326,509,228/-.However due to unforeseen circum-stances, the plaintiff's quarry business experienced cash flow challenges and was unable to meet their obligations.

v. In view of the above, there was a meeting in April 2018 to discuss the way forward. However in June 2018 the defendant entered the applicants premises and since then have never accounted for the daily management of the same and further that the defendant seized properties of the applicant worth millions of shillings and sold the same at throwaway prices and the said entry was calculated to fetter and clog the applicants right of redemption by keeping it away from its only source of income and that forcible entry is outlawed by Section 94(2) of the Land Act that proscribes entry unless a 30 day's notice is

issued; further that failure to issue the requisite notices under Section 94(1) and 89(2) of the Land Act, 2012 meant that the respondent acted illegally.

vi. By not crediting the applicant's account with Kshs 13,514,227.19, the defendant acted fraudulently and due to lack of accountability on the part of the respondent the applicant is unable to know the exact legitimate amount and will suffer substantial loss if the application is not heard and further that the suit property is a prime property with a value of Kshs 4 billion.

3. The grounds of the application are further contained in the affidavit of David Muigai Nganga deposed on 29th August, 2019, and in addition to the grounds contained in the chamber summons, he deposes that a debenture and supplemental charge over the applicant's property were executed as per annextures DMN4 and DMN5 and over time the applicant made payments to the tune of Kshs 326,509,228/- but however the applicant was unable to service the loan amount. It was deposed that the applicant sought to restructure the facility that was acceded to by the respondents vide letters marked DMN 11 to 15 whereupon the applicant sought funds to service the loan. However the same was not forthcoming and as a result the respondent ambushed the applicant by taking over the quarry site and sold the applicant's property evidenced by DMN19 and the applicant was notified of the outstanding amount vide letter marked DMN 22 whereupon property worth millions were carted away. It was deposed that there is a Miscellaneous Application E003 of 2019 that is pending before the high court at Milimani.

4. The dispute between the Applicant and the Respondent as espoused in the main suit is in regard to the Applicants prayers for:

a. A declaration that the Respondent/Defendant's entry onto the plaintiff's property in June 2018 amounted to a clogging of the Plaintiff's equity of redemption.

b. A declaration that the forceful entry by the defendant onto the plaintiff's property in exercise of its power to enter into possession was premature, illegal and unlawful.

c. A declaration that the intended exercise of power of sale by the defendant is unavailable as the plaintiff has redeemed its property.

d. An order for a true and accurate statement of accounts on all the loan facilities offered to the plaintiff.

e. An order that the Respondent/Defendant account for the plaintiff's assets that it seized upon taking possession of the plaintiffs property.

f. An order that the Respondent/Defendant pays Kshs 300,000,000/- being the worth of the finished products on site.

g. Kshs 186,913,829 being the value of the machinery as well as equipment and spare parts.

h. General damages

i. A permanent injunction restraining the Respondent/

Defendant by themselves, its servants, agents and or employees, or otherwise howsoever from exercising its power of sale over the plaintiff/applicants property known as LR NO 28617 (I.R 129519) Mavoko.

j. An order directing the defendant to withdraw from possession of the plaintiff/applicants property known as LR NO 28617 (I.R 129519) Mavoko Municipality.

k. Costs and interest.

l. Any other further relief as the court shall deem proper and or just.

5. In reply Stephen Atenya, a senior legal manager of the Respondent Company who read the application and sought advice of his lawyers deposed that various banking facilities were advanced to the applicant and the amount owing stands at Kshs 261,747,429.03. It was admitted that a loan holiday was applied for and awarded to the applicant and that the interest continued notwithstanding the inability of the applicant to pay. On 3rd May, 2019 it was agreed that the defendant could enter the suit property and in June, 2018 the respondent seized the properties by virtue of its rights under the Hire Purchase facility agreements thus lawfully seized the chattels on site. On the ground of advice of the company lawyers, he deposes that the Movable Property Rights Act accorded a secured creditor the right to obtain possession of collateral where there was no objection and in this case the applicant did not object to the possession of the subject property so to that extent it was lawful. Furthermore, that the movable assets were disposed of in accordance with the Movable Property Rights Act and that the respondent has never managed or controlled the applicant's quarry business and only entered the suit property to collect its collateral as contractually entitled under the hire purchase facilities. Furthermore, the applicant has not established a prima facie case and the documents in the supporting affidavit do not formulate a cause of action against the respondent and such matters are the subject of proceedings in Nairobi Commercial Cause E003 of 2019 between the parties which does not prevent the respondent from exercising its statutory power of sale. Further it was deposed that the allegation of failure to account are false and the discrepancy in account detail that is denied is not ground to grant an interlocutory injunction. Further that the notice under Section 90(1) of the Land Act is inapplicable for purposes of obtaining possession of a collateral that is governed by the Movable Property Rights Act. It was deposed as advised by the Respondents lawyers, the conditions for grant of an injunction as per the case of Giella v Cassman Brown have not been satisfied and thus the application should be dismissed with costs.

6. The court was subsequently addressed in oral submissions. The Applicant's Counsel submitted that the respondent entered the suit premises without notice and that the same was only issued on 14.3.2019 pursuant to Section 90 of the land Act. However section 89(2) of the same Act bars entry unless it is pursuant to section 94 of the Act. Learned counsel submitted that there should have been notices prior to entry. It was learned counsel's gravamen that the respondent entered the premises in 2018 and intermeddled with the property and have been there to date and have not accounted for the same pursuant to section 94(6) of the Land Act and added that the bank owes the respondent money as it has not credited the sum of Kshs 13 million. Further that the applicant requires accountability so that it may establish the amount owing and the failure to do so prompted it to file an application in Milimani court that is still pending. Learned counsel cited the case of **Mrao v First American Bank (2003) KLR 125** in support of the submission of the test to be met for grant of an injunction. Learned counsel posited that they have established that they have a prima facie case and also irreparable harm has been occasioned to the applicant for damages cannot atone their loss and within the purview of Section 89 of the Land Act. The actions of the respondent has led to a clog on the equity of redemption by virtue of the impugned forceful entry. On balance of convenience, learned counsel strongly pointed out that they shall lose property and income that is protected by law and the suit property ought to be saved pending the determination of the main suit. Counsel added that from their lens the balance of convenience tilts in favour of the applicant. Counsel placed reliance on the case of **Suleiman v Amboseli Resort Ltd (2004) eKLR** and added that the property is worth KShs 4 billion and yet only Kshs 261 million is the amount in dispute. According to counsel, the respondent has not denied taking possession of the suit premises and hence prayer 4 should be granted by virtue of Section 94 (8) (c) which provides for an order for the respondent to cease possession of the suit property. In the interim, counsel prayed for grant of prayer 2 as the period of the statutory notice expires on 24th September 2019.

7. Learned counsel for the respondent in opposition to the application submitted that in line with the case of Giella v Cassman Brown, no prima facie case has been established; that there is an amount owing and statutory notices have been issued and the correctness of the same has not been challenged. Learned counsel argued that the respondent is not aware of the Kshs 13 million and that it is well settled that a dispute on accounts is not a ground for grant of an injunction; he argued that the dispute on accounts does not establish a prima facie case. Learned counsel argued that there is no evidence of forceful entry since no police report was even made and added that the only entry was for purposes of taking movable property and no complaint was made in that regard. According to counsel, the movable properties were secured under a different regime, that is hire purchase and the averment that properties were sold at throwaway prices does not hold since no valuation report was prepared and further opposed the prayer for interim orders. Counsel added that the 40 days notice to sell is yet to be issued by which time the court will have determined the matter and the plaintiff will not suffer any prejudice.

8. In rejoinder, learned counsel for the applicant submitted that movable and immovable property could not be separated since the loan was granted as one and emphasized that the respondent entered the suit premises and chased the applicant's employees. Counsel emphasized that a prima facie case had been established and therefore in the interim prayer 2 ought to be granted.

9. I have carefully considered the Applicants application as well as the Respondent's reply together with the affidavit evidence and the documents attached. I have also considered the oral submissions of Counsel. The issues for determination are whether the court may grant the orders sought. The primary response of the Respondent's Counsel to the Applicant's application is that no prima facie case has been established and that they entered the suit premises under a different regime; *to wit* the Movable Property Rights Act and not under the Land Act. From those premises, the Respondent's Counsel imputed that the application is premature for the notice to sell is yet to issue and in so far as they acted under the Movable Property Rights Act in respect of the movable properties that were secured under hire purchase, their actions were within the law.

10. The second issue is that the Applicant has an outstanding loan amount and in that regard they have given a notice in accordance with Section 90 of the Land Act.

11. I have carefully considered the Respondents contentions and I agree with the submissions that an application to court in respect of remedies sought by a mortgagor or mortgagee is brought under the legal regime of the Land Act, 2012. I also agree that a specific law was enacted to deal with the remedies of movable properties secured and for the power of court and the parties in respect of chattels as stipulated in the preamble to the Movable Property Security Rights Act. The preamble to the said Act is emphasized and the preamble reads as follows:

"**AN ACT of Parliament to facilitate the use of movable property as collateral for credit facilities, to establish the office of the Registrar of security rights and to provide for the registration of security rights in movable property and for related purposes**." (Emphasis added)

12. The Applicant in their own pleadings pleaded that the loan was secured by *inter alia*, "Hire purchase agreement joint registration and comprehensive insurance covers with banks interest noted over the vehicles". The extent to which it applies is a moot issue, for the copy of the agreements have not been provided hence I am of the view that during trial, whether or not the entry was within the law shall be determined during trial. I am cognizant of the right to independent action envisaged under the Movable Properties Securities Rights act 2017 under Section 5 thus;

> ***(1) Except for sections 5(2), 6, 8, 56, 57 and 80 to 87, the provisions of this Act may be derogated from or varied by agreement, provided that the agreement does not affect the rights or obligations of any person that is not a party to the agreement.***
>
> ***(2) A person shall exercise the rights and perform the obligations under this Act diligently and in good faith***

13. Part VII of the Act sets out the regulations in respect of enforcement of security rights by a secured creditor upon default by a grantor. Section 66 provides that a secured creditor may exercise its post-default rights by application to a court or in accordance with the provisions of Part VII, without applying to a court. Should the grantor default on any of the grantor's obligations, the secured creditor shall serve a notice to the grantor in writing or in any form agreed between the parties, to pay the money owing or perform the security agreement. The notice should contain the information set out under section 67(2) of the Act which includes among others, the nature and extent of default, actual amount where money is owing, act to be done etc. Section 67(3) sets out the methods of enforcement of the secured creditor's rights should the grantor not comply with the notice. Under this Section, the secured creditor may sue the grantor, appoint a receiver of, lease, take possession or sell the immovable asset. Section 68 (1) provides that a secured creditor may sue the grantor for performance of the obligations

secured by the security agreement only if the grantor is personally bound to satisfy the secured obligation, the collateral is rendered insufficient to fully satisfy the secured obligation or the secured creditor is deprived of the whole or part of the security right through a wrongful act or default of the grantor or debtor. In the event that the secured creditor intends to dispose of the collateral, the secured creditor must send a notice to the grantor of its intention to dispose of the collateral as required under section 73(1) of the Act. This notification must be sent to (1) the grantor and the debtor and (2) any other secured creditor that has registered a notice with respect to the collateral a least five (5) working days before the notification is sent to the grantor. Section 89(2) of the Act provides that, except as provided in the Act, the Act shall apply to all security rights within its scope, including prior security rights. A prior security right means a right covered by a security agreement entered into before the coming into force of the Act, that is a security right within the meaning of the Act and to which the Act would have applied if it had been in force at the time when the security right was created.

14. The respondents have denied entry to the suit premises and I would need cogent evidence to determine the same and in this regard I reserve my determination in respect of prayer 4 to the main suit. If the court finds that the respondent acted in bad faith, then it will be in a position to make requisite orders for compensation.

15. With regard to the applicant pleading that the loan was also secured by *inter alia* **"Supplemental and fixed charge Kshs 247.4 m/- over the suit property located in Katani, Machakos county**" and to that extent it is a mortgagor any remedies sought in respect of the same are deemed to have been filed as enabled by the Land Act, 2012. Specifically, the Act affords the applicant protections. It should be served with the requisite statutory notice to remedy any default within 90 days, and he should be fully informed of the acts needed to remedy the default and his right to apply for relief. The notice must fully comply with section 90(1) of the Land Act. After the borrower has failed to remedy the default in accordance with the notice issued under the law, he is entitled to a notice of not less than 40 days under section 96(2) of the Land Act before the chargee can sell the charged property. The notice under section 96(2) of the Land Act is mandatory, precedes and is quite apart from the Redemption Notice issued under rule 15 of the Auctioneers Act. Courts have rendered themselves explicitly on this obligation. In **Albert Mario Cordeiro& another vs Vishram Shamji [2015] eKLR** the Court rendered itself thus:

> **Notice to sell charged property under Section 96(2) of the Land Act which provides as follows:-**
>
> > **"Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for sale of the charged land until at least forty days have elapsed from the date of the service of the notice to sell".**

16. The requirements under section 96(2) of the Land Act are mandatory. Of importance, Section 89 of the Land Act provides expressly that equity of redemption will not be extinguished except in accordance with the provisions of the said Act. Therefore, exercise of Chargee's Statutory Power of Sale will only extinguish the Chargor's Equity of Redemption if it is strictly exercised in accordance with the Land Act. Section 96(2) of the Land Act is one of the provisions of the Land Act which reinforce the Chargors Equity of Redemption.

17. I have not seen the said notice of sale and therefore it would be putting the cart before the horse to decide that there is imminent danger of the suit property being sold. Indeed the respondent's counsel has indicated to the court that they are yet to issue the notice to sell the property.

18. The applicant has averred that the actions of the respondent amount to a clog on the equity of redemption. Equity of Redemption is the right to extinguish the mortgage and retain ownership of the property by paying the debt. The sale by public auction extinguishes Equity of redemption at the fall of the hammer whether the property is transferred to the purchaser or not. I find the applicant's application is premature as the sale of the mortgaged property has not taken place. In **Santley v. Wilde [1899] 2 Ch 474**, Lindley M.R. gave one of the founding explanations of the basis of this doctrine –

> "The principle is this: a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage: and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding. That, in my opinion, is the law. Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that 'once a mortgage always a mortgage'."

19. In light of the foregoing and in my analysis in paragraphs 11 and 12, the applicant has failed to show that there has been a clog to the right of redemption.

20. The Applicant has raised a serious question as to whether the conduct of the loan affairs of the Applicant by the Respondent is unlawful. I find the contentions of the Applicant need to be further investigated and cannot be decided on the merits at this stage of the proceedings as both parties appear to accuse each other of some wrongs. It is proper to await he main trial when the rival issues will be determined.

21. In answer to prayer 3, it has been established by the law and the decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the status quo between the parties pending the disposal of the main suit. The conditions that have to be fulfilled before the court exercises its discretion to grant an interlocutory injunction have been well laid out as follows:-

> ***a) The Applicant has shown a prima facie case with a probability of success.***
>
> ***b) The likelihood of the applicants suffering irreparable damage which would not be adequately compensated by award of damages.***

c) Where in doubt in respect of the above 2 considerations, then the application will be decided on a balance of convenience (see Fellowes and Son v. Fisher [1976] I QB 122).

22. These principles can be found in such cases as **American Cynamide Co v. Ethicon Limited [1975] AC 396** and **Giella v Cassman Brown Co. Ltd [1973] E.A. 358**.

23. What amounts to a prima facie case, was explained in **Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** which defined a prima facie case as follows;

> **"..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."**

24. Based on the material presented to the Court, and the court properly directing itself thereto, can it 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 Defendant? The Applicant has raised two pertinent issues. The first is that it was not served with the requisite notices under the law (this issue was addressed in paragraph 11 and 12 above). And the second is that there is a dispute in the amount. Courts have decided that a dispute in the amount owed is not ground to stop a mortgagor from exercising their power of sale (See **Zum Zum Investment Limited v Habib Bank Limited (2014) eKLR and Patrick James Mbogo & Another v Bank of Africa Kenya Limited (2017) eKLR.** I find that in respect of the mortgaged suit property, there are no serious questions to be tried hence the prima facie case test fails. Nevertheless, there are serious questions to be tried as to the legality of the actions of the Respondent in entry of the suit property that I had earlier indicated would need to be interrogated at trial because the court does not have a copy of the hire purchase agreement and unfortunately, the injunction relates to the suit property and not the chattels that were secured under the hire purchase agreement mentioned by the applicant.

25. The next question for the court to determine is whether the applicant will suffer irreparable damage if the injunction does not issue. Irreparable damage has been defined by **Black's Law Dictionary, 9th Edition Page 447** to mean "damages that cannot be easily ascertained because there is no fixed pecuniary standard of measurement." The purpose of granting a temporary injunction is for preservation of the legal rights of the parties pending litigation. The court doesn't determine the legal rights to the property but merely preserves it in its current condition until the legal title or ownership can be established or declared. If failure to grant the injunction might compromise the applicants' ability to assert their claimed rights over the land, for example when intervening adverse claims by third parties are created, there is a very high likelihood of occasioning a loss that cannot be compensated for with money. In this case, the possibility of irreparable loss has not been established for there is no imminent danger of the suit property being transferred, disposed of, encumbered or in any other manner alienated before determination of the suit. The forced sale valuation, the notice to sell have not been tabled before the court.

26. Since the above two conditions have not been met, it is not necessary to consider the last factor which is the balance of convenience except for purposes of determining how extensive the ambit of the restraint imposed should be. I have considered there is no imminent threat to sell, transfer, dispose off or through other ways alienate or create encumbrances over the suit property.

27. The other factor that is relevant to this application is the extent to which the determination of the application at an interlocutory stage will amount to a final determination of the rights and obligations of the parties. That point was addressed in **NWL Limited v. Woods [1979] WLR 1294**. Lord Diplock held that cases where the grant or refusal of an injunction at the interlocutory stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, were exceptional "but when they do occur they bring into the balance of convenience an important additional element." He concluded:

> "***Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other***."

28. To this end, taking into account the facts and circumstances of this case and in order to improve the chances of the court being able to do justice after a determination of the merits at the trial I order that the status quo in the suit property be maintained until the final disposal of the suit. I am guided by the principle that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in **American Cyanamid Co v. Ethicon Ltd [1975] AC 396 at page 408. In Pricillah Wanja Kibui v James Kiongo Kibui & another [2014] eKLR**, the court observed that "So the status quo as ordered could also include what was happening as at the date of the order…"

29. In the premises, the Applicant's application partially succeeds in the terms indicated in paragraph 28 above namely that an order of status quo be maintained pending the determination of the main suit and consequently the rest of the prayers in the application lack merit and are dismissed. The parties shall fix the matter for hearing on priority basis. The costs of this application shall abide the main suit.

It is so ordered.

Dated and delivered at Machakos this 30th day of September, 2019.

D. K. Kemei

Judge