REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 19 OF 2019

BIO CORN PRODUCTS (EPZ) LTD.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK LIMITED.....DEFENDANT

RULING

1. The applicant (**BIO CORN PRODUCTS (EPZ) LTD** by application dated 3rd May 2019 seeks an order of injunction against the respondent **(DIAMOND TRUST BANK LIMITED)** to prevent it by itself, the employees, servants, agents or auctioneers from advertising for sale, whether by public auction or private treaty, disposing or otherwise completing the conveyance, concluded by an auction, taking possession, appointing receivers or exercising any statutory power of sale conferred by section **90 (3) of the Land Act**, leasing, letting or charging, or otherwise interfering with the ownership and title to the parcel of land known as **Eldoret/Municipality/Block 10/34**.

2. Further, that an interlocutory mandatory injunction issues compelling the respondent to render a true and proper account to the applicant and the court, the actual status of the charge accounts.

3. The application is based on the grounds that the applicant is the registered proprietor of the suit land which is prime property and occupied by tenants. In the year **2014** the applicant was approached by **Equip Agencies Ltd** to assist it secure an overdraft facility with the respondent by offering the suit property as security.

4. The facility was offered as per the offer letter **dated 15th October 2014**. The facility was enhanced **by kshs. 140 Million** together with other facilities in favour of Equip Limited but not secured by the charge over the suit property. The maximum limit was fixed at **Kshs. 280 Million** as per the letter of offer dated **25th march 2015**. The facility was granted upon certain terms including a further legal charge over the suit land for a sum of **Kshs. 140 Million**.

5. On **17th November 2014** the applicant executed a charge over the suit land in favour of the defendant. On **1st April 2015** the applicant allegedly executed a further charge over the suit property in favour of the respondent. The interest in respect of the charges for **Kshs. 100 Million and 140 million** respectively was **16.5% p.a** on a reducing balance as provided in the letters of offer.

6. The respondent served statutory notices upon the applicant for the balance of the charged amounts and interest accruing. The applicant sought to have the statutory power exercised by the defendant suspended.

7. The applicants by the written submissions argue that the there is no evidence that the notices under **section 90 and 96** were duly served upon the plaintiff to warrant the exercise of statutory power of sale. The cases of **Stephen Boro Gitiha v Nicholas Ruthiru Gatoto & 2 others (2017) eKLR and Mangilo Ochieng & Another v Fanuel B. Ochieng & 2 others (1996) eKLR** on service of statutory notices were cited to support this argument. It is contended that lack of proof of service of statutory notices has been held as adequate for grant of injunction. If the sale of suit property is carried out in the absence of proper notice to sell it will amount to a clog on the chargor's' equity of redemption.

8. The applicant submits that whereas the facilities were limited for a one-year period the respondent extended the same and allowed the borrower to continue drawing funds from the account in excess of the limit without notifying the applicant. That the applicant has never communicated any default on the part of the borrower nor bothered to keep separate accounts in respect of the separate facilities, the lumping up of facility accounts otherwise not secured by the suit property amount to a clog on the plaintiff's equity of redemption. He urged this court to be guided by the decision in **Gitonga Kithinji Muriuki v Kings Capital Limited & 2 others (2017) eKLR**.

9. The allegations that the principal borrower has admitted the debt and in respect of which an injunction was denied in **HCCC 382 of 2018** does not hold water. The purported admission on without prejudice basis is not admissible under section 175 of the evidence act. The applicant referred to the case of **Equip Agencies Limited v I&M Bank Limited (2017) eKLR** to buttress this submission.

10. The respondent is faulted as having violated the ***in-duplum rule***. Further, it has overcharged interest which it continues to recharge interest and penalties thus creating a situation of perpetual indebtedness to clog the applicants' equity of redemption. The overdraft account has been inflated since inception. The respondent admitted and reversed excess interest of the sum of **Kshs. 17,870,075/-** in May 2017. The respondent in the purported demand acknowledged that it is charging interest at the rate of between **25% and 30%.** It is pointed out that on 14th September 2016 the **Banking Amendment Act 2016** came into force and amended the Act by creation of **section 33B**, so the interest of between 21% and 34% charged by the respondent was in contravention of the act.

11. The applicant further submits that under **section 60 and 61** of the **Consumer Protection Act**, if the lender does not disclose when interest accrues and the rate thereof upon deferral of payment, it is deemed to waive the interest that would otherwise accrue. The default charges imposed herein are also faulted as flouting the said provisions. The applicant argues that the respondent is estopped from purporting to exercise its statutory power of sale since the respective overdraft was repaid in full, and if any amount is owing the same arises from unlawful interests and charges hence irrecoverable under the law.

12. It is submitted that the suit property is an industrial property with a current market value of over **Kshs. 1 billion**, and its sale will mean a total collapse of the applicant's operations and closure of business. Therefore no amount of damages will be sufficient to compensate the loss of business.

13. It is the applicant's contention that, it is more convenient to save the suit property from sale since the respondent still holds title to the same, and is not likely to suffer any loss which cannot be compensated by way of damages if the injunction is granted. That in any case, the respondent has indicated to the court that the principal borrower is committed to payment of its debts, and the applicant has also demonstrated that the principal borrower has obtained a decree against the government for a sum in **excess of kshs. 34 billion,** and which decree is in the process of being executed.

14. The applicant also seeks for accounts to be taken and made under the provisions of **Order 20 rules; 1,2,3 and 4 of the civil procedure rules** as a preliminary question triable before the full hearing. That the rendering of a true, proper and accurate account will assist in establishing the actual status of the loan account, as the applicant has been wringed, and its property offered for sale irregularly.

15. In its written submissions, the respondent takes the position that the only issues for determination should be; whether the applicant has a prima facie case, whether irreparable injury will be suffered if the injunction is not granted and if there are any doubts that the balance of convenience tilts in the applicant's favour.

16. The respondent argues that the applicant does not have a prima facie case with a probability of success. It is pointed out that the applicant and the borrower obtained an aggregate overdraft facility **of kshs. 280,000,000.00**. That, the documents on record show that they both duly executed the letters of offer including the one dated **25th March 2015** and the further charge dated **1st April 2015**. The further charge at clause 1(c) clearly provides that the applicant shall pay to the respondent a total sum of **Kshs. 280,000,000.00** exclusive of interest and the property shall remain as security until the additional debt has been settled.

17. The respondent maintains that there is no improper tacking as alleged, as the statement of accounts clearly show the amounts borrowed, the credits by the borrower and the applicant and the debits.

18. The respondent submits that the issue of interest being demanded was canvassed in **Nairobi HCCC No. 382 of 2018 – Ashite Chandrakant Patel & Another v Diamond Trust Bank Ltd** wherein the court relied on the borrower's letter as proof that the debt was admitted. The issue of privilege was dismissed by the court in the aforementioned case and the court stated that privilege in that communication belonged solely to the author of the document, that is equip agencies. The court further noted that the failure by guarantors to enjoin the principal debtor who has admitted the debt is not without significance since it is the principal debtor that ought to raise the issues such as the inflation sums due. The court agreed with the bank that the facility advanced was not a loan but an overdraft facility and therefore the sums being claimed are not a loan but an overdraft facility. The respondent points out that from the documents it is clear that **Equip Agencies Limited** and the applicant are related companies, therefore the application is a malicious attempt to frustrate the bank from recovering monies owed to it. That, this is evident from the letters of offer and the further charge dated **1st April 2015**, and the applicant is barred from feigning ignorance about the facilities advanced to the borrower.

19. The applicant is accused of deliberately failing to disclose to the court that the borrowers have defaulted in making payments and that they had even admitted owing the respondent and were working towards reducing the outstanding amounts evidenced by **Annexure TU-10**. Further, the statements of account provided in annexures **TU-19 and TU-20** disclose that the outstanding amounts due under the facilities as of **5th October 2018 was Kshs. 35,730,152.36 and kshs. 360,496,539.27.**

20. It is argued that given the above facts it cannot be disputed that the respondents statutory power of sale had arisen. The respondent cited the decision in **Mrao Limited** and submitted that a mortgagee cannot be restrained just because the amount is in dispute but only payment in court will restrain the mortgagee. Citing the case of **Housing Finance Company of Kenya v Ngege Kitson Mondo (2006)** the respondent maintains that where there is a clear case of default, there exists no basis for granting an injunction to prevent the mortgagee from exercising its statutory power of sale unless the sum due is paid in court. The position is trite law as per the case if.

21. Further that, the in **James Otiang Okoth & Another v NIC Bank Limited (2017) eKLR** court has stated that a dispute as to accounts cannot form the basis for an injunction restraining a party from exercising its statutory power of sale as was held in the case The applicant was served with the requisite statutory notice and the respondent has annexed to the replying affidavit various statutory notices as annexures **TU-5, TU-6, TU-7, TU-8 and TU-9**. The respondent has also annexed the certificates of posting. It is also pointed out that the applicant had annexed the statutory notice dated 9th February 2018 at page 48 of its bundle of documents and therefore cannot allege to not have received the same.

22. It is submitted that the court cannot grant an injunction on the basis that there was a procedural defect in service of the notices alone. The

respondent cited the Court of Appeal case of National Bank of Kenya Ltd. V Shimmers Plaza Limited (2009) eKLR in support of this submission.

23. It is pointed out that evidently the letters of offer and the charges which provided that the facility was to attract a fixed interest rate of 16.5% per annum were in place before the amendment to the Banking Act. They further provided that in default of paying the sum payable the interest will attract a further default of 10% per annum. That the respondent confirms it was initially applying the contractual rates but is now applying the rates in line with the Banking act.

24. The respondent relied on the case of **Andrew Muriuki Wanjohi v Equity Building Society & Another (2006) eKLR** to buttress the argument that the applicant has not proven it will suffer irreparable harm, and any in the event of any loss the same can be compensated by damages.

25. The respondent laments that it is prejudiced by the fact that it cannot recover the sums due and owing from the borrower, and neither the borrower nor the applicant have made any payment for a considerable time. The outstanding amount continues to accrue interest and the total amount due will surpass the value of the suit property. the defendant will not be able to sell the property and recoup what is due and owing.

26. The applicant is accused of failing to disclose to the court that;

i. it is a beneficiary to the facilities advanced,

ii. it is a related company to the principal debtor and they have a common director,

iii. the borrowers were in arrears on the financial facilities secured by the charge over the property,

iv. the borrowers have been unable to attend to its clear default and the borrowers have been indulged by affording them time to make payments to reduce the outstanding amounts.

27. That these are material non-disclosures disentitling the applicant from the orders being sought, and reference is made to the correspondences that took place with the principle borrower; see annexures (TU-11, TU-12, TU-13, TU-15 and TU-16 in the defendant's replying affidavit). Those correspondences are described as clear evidence of promises made to the bank but never honoured.

28. The respondent further points out that the applicant has not sought a prayer for accounts as an alternative prayer but as an additional prayer despite the fact that the two prayers are governed by different judicial principles. The plaintiff has failed to demonstrate any grounds warranting for the granting of the orders sought.

ISSUES FOR DETERMINATION

a) Whether the Applicant has a Prima facie case

b) Whether the Applicant shall suffer irreparable harm

c) Whether the balance of convenience tilts in the applicant's favour.

WHETHER THE APPLICANT HAS A PRIMA FACIE CASE

29. The applicant submitted that it was not served with the statutory notices and as such the exercise if the power of sale was not proper. **Annexture TU-5** clearly demonstrates that the respondent issued a notice under section 90 of the Land Act. **Annexture TU-6** contains the notice under section 96 of the Act evidently served vide registered post. On the ground of service, the applicant has not established a prima facie case. In any event that service was not duly carried out the same is not a ground for an injunction, the court would be obliged to grant stay to the extent that service be duly carried out.

30. The applicant contends that the amount claimed was not secured by the charge over the suit property. There are however letters of offer **dated 14th August 2014, 15th October 2014 and 25th March 2015** where the respondent extended to the borrower an aggregate draft facility of **Kshs. 280,000,000/-. Annexure TU-4** is the further legal charge dated **1st April 2015** which confirms that the amount claimed was secured by a charge over the suit property.

31. The applicant argued that the charges on interest which the respondent was charging flouted the provisions of the consumer protection act as the lender had not disclosed the rate of interest accruing and the rate thereof upon deferral. It is significant to note that the letters of offer and the charges were in place before the amendment of the Banking Act. They provided that the facility attracted a rate of 16.5% per annum and that in the event of default the interest would attract a rate of 10% per annum. It is therefore misleading to claim that the same were not disclosed.

32. With reference to the establishing a prima facie case, Lord Diplock in the case of ***American Cyanamid vs Ethicon Limited [1975] AC 396*** stated thus,

> ***"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities, that is the end of any claim to interlocutory relief."***

33. I take note that **Annexure TU-10** is a clear admission of indebtedness. The dispute as to the amount claimed is also not a basis for a court to grant an injunction. In **Mrao Ltd. V First American Bank of Kenya Limited & 2 others (2003) KLR 125,** Hon. Kwach J.A observed that a mortgagee cannot be restrained just because the amount is in dispute, but only payment in court will restrain the mortgagee.

WHETHER THE APPLICANT STANDS TO SUFFER IRREPARABLE INJURY WHICH WOULD NOT BE ADEQUATELY COMPENSATED BY DAMAGES

34. In **Andrew Muriuki Wanjohi v Equity Building Society Ltd & 2 others [2006] eKLR** the court held;

> **By offering the suit property as security the chargor was equating it to a commodity which the chargee may dispose of, so as to recover his loan together with interest thereon. Therefore, if the chargee were to sell off the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property.**

Section 99(4) of the Land Act provides;

> **A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.**

35. Annexure TU-21 contains a valuation report that states the market value of the suit property. further, the respondent is a stable bank capable of compensating the applicant in damages.

BALANCE OF CONVENIENCE

36. In **Suleiman vs. Amboseli Resort Limited (2004) 2 KLR 589** Ojwang J (as he then was) rendered himself as follows:

> ***…Traditionally on the well-accepted principle, the Court has had to consider the following question before granting Injunctive relief (i) is there a prima facie case with a probability of success (ii) does the Applicant stand to suffer irreparable harm if relief is denied (iii) on which side does the balance of convenience lie" Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers of Interlocutory Injunctive relief, should always opt for the lower rather than the higher risk of injustice. Although the Court is unable at this stage that the Applicant has a prima facie case with a probability o*f *success, the Court is quite convinced that it will cause the Applicant irreparable harm if his prayers for injunctive relief are not granted …. and in those circumstances the balance of convenience lies in favour of the Applicant rather than the Respondent. There would be a much larger risk of injustice if the Court found favour of the defendant, than if it determined this application in favour of the Applicant".***

37. Given that the applicant has failed to prove a prima facie case or that there would be irreparable loss, the balance of convenience lies in not granting the prayers. If the applicant continues to be indebted to the applicant the decretal amount may become higher than the market value of the suit land and consequently the respondent will not be able to claim all monies owed and due to it.

38. The applicant has not made any effort to make any payments to the respondent since being served with the notices. There has been no suggestion to deposit any amounts in court pending the suit. **Annexure TU-10** is a proposal by the applicant on settlement of the debt but the same was never followed through. It is also an admission of indebtedness.

I hold that the application fails and is dismissed with costs to the respondent.

Delivered, Signed and Dated this 24th day of September 2019 at Eldoret

H. A. OMONDI

JUDGE