REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E110 OF 2019

HIGHGROVE HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

I & M BANK LIMITED.....1ST DEFENDANT/RESPONDENT

GARAM INVESTMENT LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

(1) Before this Court the Notice of Motion dated **30th April 2019** by which **HIGHGROVE HOLDINGS LIMITED,** (the Plaintiff/Applicant) seeks the following Orders:-

> **"1. SPENT**
>
> **2. THAT the purported sale be declared illegal, null and void.**
>
> **3. THAT the 1st Respondent be compelled to produce its true and proper account affecting the facility.**
>
> **4. SPENT**
>
> **5. THAT pending the hearing and determination of the suit herein, this Court be pleased to order that the status quo be maintained.**
>
> **6. THAT the costs of this application follow the cause."**

(2) The Application was premised upon **Section 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1 and 2, Order 40 Rules 1 and 2, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 89(1) of the Land Act No.6 of 2012, Section 96(2) & 96(3), 97(1) & (2) of the Land Act No.6 of 2012** and all other enabling provisions of the law. The same was supported by the Affidavit sworn by **KIRIT KANABAR** the Managing Director of the Plaintiff/Applicant Company.

(3) The 1st Defendant/Respondent **I & M BANK LIMITED** opposed the Application and in so doing relied upon the Replying Affidavit dated **2nd May 2019** sworn by **ANDREW MUCHINA**, a legal Officer – Recoveries with the Respondent Bank. On **2nd May 2019,** the Defendant/Respondent filed a Further Affidavit dated **12th May 2019**.

(4) Directions were given that the Application would be disposed by way of written submissions. The Defendant/Respondent filed their written submissions on **12th June 2019**. Despite the presence counsel for the Plaintiff/Applicant, in court on **2nd May 2015** when these directions to file written submissions were given, and despite having had over one month to comply, the Plaintiff/Applicant did not file any written submissions. The court then proceeded to give a date for Ruling.

BACKGROUND

(5) Pursuant to a letter of Offer dated **10th January 2017**, the 1st Respondent granted to the Plaintiff/Applicant an overdraft facility in the amount of **Kshs.106,000,000**. This facility was to be utilized for the purpose of financing the construction of 24 Residential Town Houses for sale on the property known as **LR 29998, Nairobi**. As security for the overdraft Facility the Plaintiff/Applicant executed the legal charge dated **27th October 2014** over Land **Reference Number 209/4892**(original Number **4639/8**) Nairobi (hereinafter referred to as the **"suit**

property."

(6) The Plaintiff/Applicant defaulted in servicing the facility as required. The Respondent Bank then issued a Demand letter dated **25th July 2017** for **Kshs.1,131,458,684.70** and **USD 188,637.37.** The Plaintiff/Applicant did not respond to this demand letter. The Respondent bank then issued a 90 day statutory notice followed by the 40 day Redemption notice. Thereafter the Bank scheduled the sale of the suit property by way of Public Auction on **30th April 2019**. The Plaintiff/Applicant then moved to court with this current application.

ANALYSIS AND DETERMINATION

(7) The Plaintiff/Applicant seeks injunctive orders to prevent any sale of the suit property pending the hearing and determination of their suit filed on **30th April 2019**. Conditions precedent for a Grant of Injunctive orders were set out in the case of **GIELLA –VS- CASMAN BROWN 1973 E.A** where it was held as follows:-

> **"The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

PRIMA FACIE CASE

(8) The Plaintiff/Applicant must satisfy the court that it has a prima facie case with a likelihood of success at trial. In the case of **MRAO LTD –VS- FIRST AMERICAN BANK [2003]eKLR**, the Court of Appeal defined a prima facie case as follows:-

> **"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case 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."**

(9) In the same **Mrao case** the Court went on to clarify the situation in which a mortgagee will not be restrained from exercising its statutory powers of sale as follows:-

> **"When mortgagee may be restrained from exercising Power of Sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.** "[emphasis added]

(10) In the present case the Plaintiff/Applicant in Para 3 of the Supporting Affidavit sworn by **Kerit Kanabar** readily concedes that they had been advanced a facility by the Respondent Bank for which facility the suit property was charged as security. In the same Affidavit at para (4) the Plaintiff/Applicant admits that it has been **"unable to clear the outstanding amount advanced to it by the 1st Respondent**" thereby admitting that they were in default. Therefore the fact of the Applicants indebtedness to the 1st Respondent's not in any doubt.

(11) In support of their prayer for an injunction the Plaintiff/Applicant claims firstly that they were not served with the requisite statutory notices in compliance with **Section 90(1)** of the **Land Act 2012** and secondly that no current valuation was conducted on the suit property contrary to the provisions of **Section 90(2)** of the same Act. However from the material availed to the court, it is clear that the Plaintiff/Applicant are being economical with the truth.

(12) Contrary to the Applicant's claim that they were not issued with the 90 day Statutory Notice, there is annexed to the Replying Affidavit dated **2nd May 2019** a Statutory Notice **dated 29th August 2017** sent to the Plaintiff/Applicant. The said notice sets out the amount owing as **Kshs.1,135,320,332.80**. Further the 1st Respondent has also annexed a copy of the 40 day Redemption Notice dated **8th February 2018** issued incompliance of **Section 90(2)** of the **Land Act**. The Applicant was not denied receipt of these notices. Indeed by paragraph 5 of its Supporting Affidavit the Applicant confirms having received the latter Notice. In light of the above it is a blatant untruth for the Plaintiff/Applicant to aver that they were not served with the requisite statutory notices.

(13) Similarly the Applicants claim that no valuation was conducted upon the suit property is disproved by the documentation availed to court. Annexed to the 1st Respondent's Further Affidavit dated **12th June 2019** is a Valuation Report on the suit property prepared by **REAL APPRAISAL LTD.** The suit property was inspected on **6th February 2019** (see page 7 of the Valuation Report) and the valuer returned a Market Value of **Kshs.250,000,000/=** and a Forced Sale Value of **Kshs.187,500,000**. This Valuation Report was current and fulfilled the requirements of **Section 90(2)** of the **Land Act**. Thus the allegation that no valuation was conducted has been proved to be untrue.

(14) It is clear that in an attempt to present a sympathetic case the Applicant deliberately failed to disclose to the court certain material facts. In other words it is evident that the Applicants whilst seeking an equitable remedy have themselves approached the court with unclean hands.

(15) In **OWNERS OF THE MOTOR VESSEL "LILIAN" –VS- CALTEX OIL (KENYA) LIMITED 1989 eKLR** the Court citing the case of **THE KING –VS- THE GENERAL COMMISSIONERS FOR THE PURPOSE OF INCOME TAX ACTS ex-parte PRINCESS EDMOND De Pligae 1917 Ikb 486** observed as follows:-

> **"And it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an Applicant comes to the court to obtain relief on an ex-parte statement he should make a full and fair disclosure of all material facts- facts not law. He must not misstate the law if he can help it- the court is supposed to know the law. But it knows nothing about the facts, and the penalty by which the court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of imperfect statement."**

(16) Likewise in **JASHUVIANTSING L. SOLANKI –VS- DIAMOND TRUST BANK [2013]eKLR**, the Court held thus:-

> **"What the Plaintiff is seeking are equitable remedies. Good faith and honesty are required for the one seeking the remedies. This is what RINGERA J. was emphasizing in the decided case of MOSES NGENYE KAHINDO VS AGRICULTURAL FINANCE CORPORATION HCCC NO.1044/ 2001, NAIROBI when he said: "And of course it requires no stressing that as an injunction is a discretionary equitable remedy, if the Applicant's conduct in relation to the subject matter of the suit is shown not to meet the approval of a court of equity, the relief may not be granted however meritorious the case may otherwise have been."**

(17) The Plaintiff/Applicant having themselves been guilty of material non-disclosure are not entitled to the equitable remedies they are seeking. Accordingly I find that the Plaintiff/Applicant have failed to show a prima facie case.

IRREPARABLE HARM

(18) In order to merit the grant of injunctive orders the Plaintiff/Applicant must demonstrate that it is likely to suffer irreparable harm, which cannot be adequately compensated by damage. The Plaintiff/Applicant willingly charged the suit property as security for the facility in question. As such the Applicant was fully aware that in case of default the suit property was likely to be sold to recover the debt due to the Bank. In **Andrew Muriuki Wanjohi Vs Equity Building Society Ltd & 2 others [2006] eKLR Justice Fred Ochieng'** observed as follows:-

> **"Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off. Therefore, in the event that it later became necessary for the suit property to be sold off, by the charge, the chargor could not be heard to complain that his loss was incapable of being compensated in damages. He had had the said property evaluated in monetary terms. He had then told the chargee that he knew the property to be capable of providing the chargee with the peace of mind, of knowing that the money given as a loan would become recoverable, even if the borrower did not pay if. By offering the suit property as security the charger 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 of the suit property, the chargor's loss could be calculable, on the basis of the real market value of the said property."**

(19) Having offered the suit property as security in order to secure the facility from the Bank, the Respondent cannot now be heard to cry foul if the same is sold, where default has occurred. In any event any loss which the Plaintiff/Applicant may suffer is quantifiable and may be adequately compensated by an award of damages.

BALANCE OF CONVENIENCE

(20) The facility in question was advanced to the Plaintiff/Applicant in the year 2017. The Plaintiff by their own admission fell into default on repayment which default subsists to date. The outstanding debt continues to accumulate interest and according to the Respondent the amount due has now outstripped the value of the security. In **THATHY –VS- MIDDLE EAST BANK (K) LTD [2002] eKLR,** the Court opined that where a Plaintiff is not repaying his mortgage debt then the balance of convenience tilts in favour of rejecting an application for injunction.

(21) Likewise in **Building and Civil Engineering Limited Vs George Ngure Chira & Another [2019]** the Court of Appeal held as follows:-

> **"That since the motor vehicles and the two parcels of land offered as security in the transaction could be sold and the proceeds paid over to the Respondent, they stood to suffer no loss. In any case, the learned Judge added it is the Respondent who stood to suffer prejudice if the loan was not settled immediately, hence the balance of convenience was in its favour.. on the second principle, the learned Judge found, in the circumstances of the dispute that any loss or injury the appellants stood to suffer if the securities were realized was capable of being ameliorated by an award of damages."**

(22) By prayer (3) of the present application the Plaintiff/Applicant sought to have the Respondent Bank compelled to produce true and proper accounts relating to the overdraft facility granted to the Plaintiff/Applicant. On **2nd May 2019** the Respondent sought and obtained leave from the Court to file a further Affidavit. The same was filed in court on **12th June 2019**. Annexed to that Further Affidavit is the statement of account which demonstrates that as at **11th June 2019,** the amount due on the facility was **Kshs.1,501,929,442/=** and **USD 915.16**. Therefore **Prayer (3)** of this Motion has been overtaken by events. Moreover it is trite law that an interlocutory injunction will not be granted where there is a dispute relating only to interest and amounts due on the facility. I find therefore that the balance of convenience tilts in favour of the Respondent bank.

(23) Based therefore on the foregoing I find no merit in the present application and I decline to grant the injunctive orders sought. Accordingly the Notice of Motion dated **30th April 2019** is dismissed in its entirety with costs to the Defendant/Respondent.

Dated in Nairobi this 29th day of November 2019.

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Justice Maureen A. Odero