REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 7 OF 2017

BRADE GATE HOLDINGS LTD.....APPLICANT

DR. THUO MATHENGE.....APPLICANT

AND

FAMILY BANK LTD.....RESPONDENT

RULING

1. The Notice of Motion was filed under a certificate of urgency and is dated the 20th April, 2017; the application is premised under the provisions of Order 40 Rules (1) and (2) of the Civil Procedure Rules 63(e) of the Civil Procedure Act and Section 44A of the Banking Act Cap 488 of the Laws of Kenya and all other enabling provisions of the law; and the applicants seek the orders as set out hereunder;

i. Spent

ii. That conservatory orders by way of a temporary injunction be issued restraining the defendant/respondent whether by itself, servants and/or its agents or whomsoever is acting on its behalf from offering for sale, selling or dealing with land **TITLE NO. RUGURU/GACHIKA/1726** in any manner whatsoever pending the hearing and determination of this application;

iii. That conservatory orders by way of a temporary injunction be issued restraining the defendant/respondent whether by itself, servants and/or its agents or whomsoever is acting on its behalf from offering for sale, selling or dealing with land **TITLE NO. RUGURU/GACHIKA/1726** in any manner whatsoever pending the hearing and determination of this suit;

iv. That the costs of the proceedings be met by the defendant/respondent.

2. The applicants rely on the supporting affidavit made on the 20th April, 2017; a further affidavit made on 27th April, 2017 both sworn by Dr.Thuo Mathenge and the grounds on the face of the application;

3. A brief overview of the facts can be stated as follows; the matter commenced by way of a civil suit instituted by the applicants against the respondent bank; the 2nd applicant is the registered proprietor of the subject matter property as well as being a director of the 1st applicant; on or about March 2016 the applicants applied for and secured credit not exceeding the sum of Kshs.121,000,000/- from the respondent; the security was a legal charge over the suit property together with three (3) other properties in favor of the respondent; the applicants contend that they have been servicing the loan in instalments dutifully despite the constraining financial challenges; the respondent contended that the applicants loan account was in arrears and through its agent Antotech Auctioneers purported to issue a forty-five (45) days notice and proceeded to advertise and threatened to sell the suit property in exercise of the bank's statutory power of sale;

THE APPLICANTS CLAIM

4. The applicants case is that the respondents want to exercise the statutory power of sale conferred upon it by law; the applicants contention is that even if the account is in arrears the respondent has not followed the procedure laid down in the provisions of the law;

5. That the applicants had a legal right and an entitlement to be issued with the requisite three month (90) days statutory notice before any sale; that even if the respondent served the statutory notices the same were not proper in law; because there were two (2) separate charges relating to two (2) different loans; that the respondent was calling for the whole loan in the statutory notice; in that the respondent failed to separate the notices to the various charges; and to notify the applicants on the nature and extent of their default to the respective charges; the respondent also failed to give notice indicating the respective amounts to be paid to rectify the alleged default and the time and consequence of the default; that it was erroneous to recall for the whole loan based on one security;

6. There was no current forced sale valuation report prepared over the suit property before the property was advertised; that the advertisement

was based on a valuation report prepared on the 8/05/2015 when the loan facility was advanced;

7. The statutory notice contained a paragraph that reads as follows;

> ***"…any amounts received by the bank after service of the notice will be on a 'without prejudice basis'…"***

8. There was another statutory notice served in respect of other parcels of land under different charges which contain a paragraph of a similar nature; the applicants submitted that such a paragraph is a clog to the applicants right of redemption; that the law abhors such a provision in written law or contract;

9. Their further contention is that in the event the sale was allowed to proceed based on the outdated valuation report they stand to lose a property worth Kshs.200,000,000/-; that the applicants would suffer irreparable loss and damage which cannot be compensated by an award for damages should the illegal, unlawful and procedural sale be allowed to proceed; that the intended sale would also be in violation of the applicants statutory rights and guarantees;

10. That they have made out a prima facie case with a high probability of success based on the fact that the bank ought to have separated the notices for each and every charge and not merge the issues; and that the Forced Sale Valuation Report (which report should be less than 12 months old) must be current and not an old one;

11. The respondents allege that the failure to prepare a current valuation report is due to the applicants denying the valuer access; but no affidavit was sworn to support this allegation; nor was there any attempt by the respondent to move to court to seek orders to enable it to carry out a fresh valuation;

12. That the applicants have passed the test set down in **Giella vs Cassman Brown** for the granting of an injunction; and that the balance of convenience tilts in their favor as the respondents stand to lose nothing; their prayer was for the respondents to be restrained from selling the suit property pending the hearing and determination of the main suit.

RESPONDENTS RESPONSE

13. The respondent in its Replying Affidavit to the application made on the 5/04/2017 the respondent opposed the averments of the applicants; and states that it is not disputed that the applicants secured a loan facility in the sum Kshs.121,170,000/- which sums were advance in small bits amounting to the cumulative amount;

14. The instalments payable on the loan was a monthly sum of Kshs.2,855,000/-; that nothing was annexed by the applicants to demonstrate or as evidence of payment; the statement of account marked as annexure **"AO.2"** shows that the last time the applicants made any payments on the loan was in June, 2016 which translates to one whole year; that the applicants were relying on technicalities of procedure but have not moved to mitigate their liability; one year has gone by but the applicants have never approached the respondent to either restructure their loan nor have they placed before this court any evidence to support the restructuring of the loan; nor have they made any attempts to clear the arrears; a prima facie case has not been made out;

15. On the 15/07/2016 a formal demand of fourteen (14) days was issued to the applicants for the payment of the arrears amounting to Kshs.6,281,928/93; no payment was made; the Statutory Notice of ninety (90) days was issued on the 15/09/2016 and was sent by registered post; the applicants did not contest having received the notice; the Statutory Notice dated 19/12/2016 was erroneously indicated as a Demand Notice; upon realizing error the respondent issued a forty (40) days notice;

16. The Auctioneers notice of forty-five (45) days was served on the 28/02/2017 at 9.25am; the notice was properly served and signed; it indicated that the proposed day of the public auction as the 5/05/2017; that when the applicants sought the loan facility they readily co-operated and allowed the respondent to access the suit property; but upon default it was not to be; on the 20/01/2017 the respondent attempted to access the suit property for purposes of conducting a fresh valuation but was denied access by the 2nd applicant;

17. The respondent reiterated that the applicants never approached the respondents to mitigate their liability even after the expiry of the notice period; the respondent contends that the applicants have no intention of repaying the loan; that non-payment of the loan constitutes a breach of the terms set out in Clause 9:2 of the Letter of Offer; and the default in payment is not denied;

18. Counsel submitted that the applicants had not made out a prima facie case; the applicants state they have been treated unfairly by the bank but have failed to tell the court what they have done to regularize the loan facility; the applicants contend that they will suffer the irreparable damage if the Kshs.200,000,000/- suit property is sold; but this figure is unsupported by any Valuation; in any event should the court find that the respondent conducted itself improperly damages would be an appropriate remedy; reference was made to the case of **Julius Kipkeni vs KCB & 2 Others** where Havelock J cited Warsame J (as he then was) in the case of **Peter Kuria vs HFCK & Anor** where it was held that;

> **"….my understanding is always that where damages may be an appropriate remedy an order of injunction should not be granted".**

19. The outstanding amount currently stands at 140,000,000/- and should the default subsist with no payments being made to service the loan the amount will surpass the purported value of the suit property and it is the respondent that stands to suffer irreparable harm;

20. Counsel submitted that the applicants have failed the two tests for the granting of an injunction; on the final test the balance of

convenience tilts in favor of the respondent bank;

21. Further the applicants had not come to court with clean hands; the application is ill conceived as their sole intention is to defeat the respondents right to realize its security; the applicants are currently enjoying interim orders without mitigation and no show of good faith;

22. In conclusion counsel submitted that in the event the injunctive order is granted the court do consider mitigating factors for justice to be done.

REJOINDER

23. In his rejoinder Counsel made reference to the case of **Jimmy Wafula Simiyu vs Fidelity Commercial Bank [2013] eKLR** where Warsame J (as he then was) held a contrary view regarding injunctions; the court cited the case of **Joseph Siromo vs HFCK Ltd (2008) eKLR and held;**

"In view of the forgoing I find that the plaintiff has made out a prima facie case with a probability of success.

I need not consider whether damages would be adequate."

24. He submitted that damages were not an automatic remedy particularly where a breach of law has been contemplated; that the Honourable Judge held in **Joseph Siromo (supra)** that;

> **"Damages cannot be a substitute for loss which is occasioned by clear breach of the law."**

25. That a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an injunction; that the valuation is an obligatory provision in the Land Act; and indeed courts have granted injunctions when a Valuation Report not being availed; or a Valuation Report that was done too far away from the date of the intended sale;

26. In totality the balance of convenience tilted in favor of the applicants; cases referred to **Alice Awino Okello vs Trust Bank Ltd** which was quoted in **Kisimayu Holdings vs Fidelity Bank [2013] eKLR**; where the Court of Appeal held that the sale of a property to be serious as it deprives one of a right recognized in law and the sale should not be allowed to proceed;

27. The applicants prayed that the application be granted as prayed.

ISSUES FOR DETERMINATION

28. After perusing the affidavits and hearing the rival submissions made by the respective parties claims this court has framed the following issues for determination;

i. Whether this is a suitable case for this court to exercise its discretion and to grant the injunctive orders sought by the applicants;

ii. Costs.

ANALYSIS

29. The applicant has filed a plaint together with a Notice of Motion praying for an injunctive order against the respondent; the application was brought under a certificate of urgency and the applicants obtained conservatory orders pending the ***inter-partes*** hearing and determination of the application;

30. The applicant avers that the respondent failed to make a proper legal demand of the money before it took the drastic step of instructing the auctioneer to sell the suit property; the bank ought to have separated the notices for each and every charge and not merge the issues; that they had a legal right and an entitlement to be issued with separate three month (90) days statutory notice before any sale; that the respondent failed to notify the applicants on the nature and extent of its default; it failed to also give notice indicating the amount to be paid to rectify the alleged default and the time and consequence of the default; and that the Forced Sale Valuation Report (which report should be less than 12 months old) must be current and not an old one; therefore there was no current forced sale valuation report done over the suit property;

31. The respondents response was that the applicants had not made any payments towards liquidation of the loan and reduction of their indebtedness to the respondent for a considerable time; that is with effect from June,2016 and in view of the default it would be unjustifiable for the respondent to be denied the right to exercise its statutory power to sell the suit property; that before the respondent appointed the auctioneer there had been a formal demand to pay the arrears and a valid statutory notice issued for the applicants to pay the balance of the loan;

32. In addressing the issues the applicants made reference to the salient principles of law that guide the granting of injunctive orders are laid down in the renowned case of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358**; the decision outlines three conditions which are;

i. That a prima facie case has been made out with probability of success;

ii. The applicant will suffer irreparable harm that cannot be adequately compensated by an award of damages;

iii. If in doubt, then the court will decide by applying the balance of convenience;

33. An applicant may pass the above test but it is also important to note that the remedy being sought is an equitable remedy from a court of equity; and that the power of the court on whether to grant an injunctive order is also discretionary; which discretion is exercised judiciously, that is upon the basis of the facts placed before it and the law;

34. The applicants conceded that it had secured a large amount of money from the respondent bank on the strength of the securities one being the suit property known as **TITLE NO. RUGURU/GACHIKA/1726** together with the other properties; that it is not disputed that they had not made any payment to the respondent bank from June 2016 to the time of filing of the instant application on 20/04/2017 which period translates to nearly a year; the applicants have rushed to a court of equity and their contention is that the respondent is precluded from realizing its securities because the notices issued were invalid or irregular as they were not issued in conformity with the laid down procedure; the implication is that the respondent did it all wrong so it must restart the lengthy process again before it can exercise its statutory power of sale;

35. The applicants add that the Forced Sale Valuation Report was not current; but they forget that they wilfully and intentionally denied the respondent bank access to the property to enable the conducting of a fresh valuation; the rebuttal to their wrong doing was that it was incumbent upon the respondent to have moved the court and obtained orders to access the suit property;

36. This attitude demonstrates prima facie that the applicants had no intentions of honoring any terms agreed upon with the respondent bank and are bent on using technicalities of procedure to frustrate the recovery of the monies had and received;

37. From the material placed before this court it is noted that a considerable length of time elapsed from the time the applicants received the demand notices and that they had reasonable time to make repayment of the arrears to avoid any further action being undertaken; which they have failed and/or neglected to do; this is found to be an outright of wrong doing and of default;

38. The applicants have come before a court of equity but have failed to show utmost good faith; and as the maxim goes that ***"equity does not assist rule breakers"***; and this court is not inclined to assist wrong doers; and it goes without saying that the applicants conduct throughout dis-entitles them from seeking the equitable remedy from a court of equity;

39. It is apparent that the applicants in this instance seek to be granted injunctive orders based on technicalities of procedure with the sole aim of avoiding repayment of the loan facility; they have not claimed that the amounts are excessive nor have they made any efforts to mitigate their liability by placing before this court evidence that they have either made attempts to approach the respondent to restructure their various loans or even attempted to pay off or deposit the amounts/arrears claimed into court;

40. For the forging reasons this court finds no basis for considering any of the grounds urged by the applicants or any of the principles laid down in **Giella vs Cassman Brown Co. Ltd (supra)**; this court reiterates the power to grant injunctive orders is discretionary; that the applicants have come before a court of equity seeking an equitable remedy but have failed to demonstrate utmost good faith; their conduct alone disqualifies them from the favorable exercise of the courts discretion;

FINDINGS AND DETERMINATION

41. This court finds that this is not a suitable case for this court to exercise its discretion and finds that the applicants are not entitled to the injunctive orders;

42. The application is found lacking in merit and is dismissed with costs to the respondent.

Orders accordingly.

Dated and Signed and Delivered at Nyeri this 15th day of February, 2018.

HON.A.MSHILA

JUDGE