REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 44 OF 2017

LONGONOT GATE DEVELOPMENT LIMITED..............................APPLICANT

V E R S U S

EQUITY BANK LIMITED...RESPONDENT

RULING

1. The application before me dated 23rd October, 2017 seeks orders that:

(i) Spent-

(ii) Spent-

(iii) That the Defendant be restrained, by way of an Order of injunction, whether acting by itself directly or through its servants or agents, from selling, or attempting to sell, or advertising for sale, or otherwise publicizing the intended sale of, any of the suit properties herein, namely property title numbers, Naivasha/Maraigushu Block 10/4014; Naivasha/Maraigushu/Block10/4013; Naivasha/Maraigush/Block 10/1130; and Naivasha/Maralgushu/Block 10/14/98, pending the hearing and determination of the suit.

(iv) Spent -

2. The application is brought under Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules: Sections 1(A) and 3 (A) of The Civil Procedure Act (Cap 21): Section 33 (B) of The Banking Act (2012); Section 84, 90, 103, and 104 of The Land Act (2012): Rule 15 of the Auctioneers Rules (1997): and other enabling provisions of the law. It is premised on the grounds that the defendant has threatened to exercise the statutory power of sale over the charged properties without following the law and the procedural steps.

3. **Lee Karuri**, a director of the plaintiff company swore a lengthy supporting affidavit setting out the background to the matter. He deponed that the plaintiff obtained a loan facility from the defendant for the sum of two hundred million shillings (Kshs. 200,000,000/-) in March 2014. That in October, 2015 the defendant restructured the loan and made a second offer dated 18th September, 2015. The defendant required the plaintiff to discharge the securities. According to further averments, the existing facility was then taken over as a personal debt by one ***James Gatune Wathigo***, one of the directors of the plaintiff. The plaintiff also charged afresh property title ***numbers Naivasha/Maraigushu Blck 10/4014; Naivasha/Maraigushu Block 10/1130; Naivasha/Maraigushu Block 10/1498*** as security for the new loan to ***James Gature Wathigo***. The plaintiffs other directors were required to execute fresh personal guarantees as security for the new loan while the defendant would assume liability for or obligation for the repayment of the loan.

4. The resultant legal charges were duly registered. The new loan was stated to be for purposes of financing pay-off and takeover of outstanding loan facilities in the name of **Longonot Gate Limited.** The loan amount was Kshs. 108,300,000/- and was to be paid together with interest for a period of sixty (60) months at 19% per annum and the monthly repayment comprising loan and interest would be Kshs. 2,809,362/=.

5. In further averments the deponent stated that the defendant has disregarded its statutory obligations to inform the applicant of the interest rates; comply with the interest rate applicable; serve the requisite notices upon default; and; serve the notification for sale. Finally, the deponent states that from their calculations based on account reconciliation by their accountant one Mary **Anne Karanja ,** the amount of arrears outstanding as at 30th September, 2017 was in the sum of Kshs. 31,691,913.43.

6. The application is opposed by the respondent through the replying affidavit sworn by **Roy Akubu** who is Senior Manager Legal services of the Defendants. He deposes that the charge and loan against **James Gatune Wathigo** guaranteed by the plaintiff for sum of Kshs.

108,300,00/= is admitted by the plaintiff and that the present application was therefore an a abuse of the process of court and unmerited. That there was a clear admission of Kshs. 31,691,913.43/= outstanding as at October 2017. That all the requisite statutory notices were issued by the defendant including:-

(i) Copy of letter from Antique Auctioneers dated 12th September, 2017 EX1.

(ii) Certificate of service by Robert Waweru Maina Sworn on 8th September, 2017-EXII.

(iii) Redemption Notice dated 8th September, 2017-EXM

(iv) Notification of sale- EXIV

(v) Demand Notice dated 25th October, 2010 – EX V

(vi) Notice of Exercise of statutory power of sale dated 20th March,2017- EX VI

(vii) Letter from Antique Auction dated 30th October, 2017 together with Newspaper Notice –EX VII.

The respondent further deponed that the plaintiff had not denied owing Kshs. 106,687,875.43 and had admitted owing Kshs.31,691,913.43 and court should order him to pay the admitted amount.

7. The applicant filed submissions dated 19th December, 2017 and reply to submissions dated 6th February, 2018. They submit that the respondent has breached the terms for the legal charges by varying the interest rate without notice, and charging interest rates above the rates permitted by law. On the issue of default the applicant submits that the plaintiff was entitled to notices in accordance with clause 10.1. of the legal charge and in compliance with **section 90 and 96(3) of Land Act.** They submit that the statutory power of sale could only accrue after the notices and that failure to serve the notices upon the plaintiff (chargor) rendered the statutory power of sale invalid.

8. The respondents submit that the applicant had been served demand notices upon default and had been served statutory notice in compliance with the law. They submit that the principal debtor one James Gatune Wathigo who had guaranteed the loan had not denied having been served with the statutory notices as required by Section 96 of the Land Act. They argue that there was no legal requirement to serve the plaintiff. The respondent further submits that an injunction was an equitable remedy and that the applicant having admitted owing Kshs. 31,691,913.43 cannot persist in refusing to pay the same while seeking to injunct the defendant. They urge that the court to consider that an abuse of the process of the court and dismiss the application.

9. I have carefully considered the respective affidavits and submissions of the parties. This being an application for an injunction, I must consider it against the well settled principles set out in **Giella Vs. Cassman Brown & Co. Ltd., (1973) EA 38 at 360** thus**:-**

> ***"First an Applicant must show a prima facie case with the probability of success. Secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly if the court is in doubt, it will decide the Application on the balance of convenience."***

10. A prima facie case has been described as one in **Mrao Ltd V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125:-**

> **"In civil cases, a prima facie case is a case in which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or arguable case. It is sufficient to raise issues by the evidence must show confinement of a right and the probability or success of the Applicant's cases upon trial. That a clearly a standard, which is higher that an arguable case".**

11. In **Nguruman Limited Vs. Joan Bonde Nielsen & 2 others CA Civil Appeal No. 77 of 2012 eKLR** cited to me by the applicants, the court of appeal stated thus:-

> **"We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated, or is threatened with violation."**

12. I have considered the applicant's arguments with respect to the service of the statutory notices. They argue that the applicant as the chargor was not served in accordance with the law. The respondent on the other had argues that the principal debtor was one **James Gatun Wathigo,** one of the directors of the plaintiff company who was duly served. A look at the affidavits of service displayed by the applicant shows that service was effected on the said **James Gatune Wathigo.** The respondent has not demonstrated that indeed they served the applicant which is a limited company. Once the applicant denied having been served the burden shifted to the respondent to satisfy the court that it had effected service in accordance with **section 90 of the Land Act 2012.** They did not discharge that burden.

13. The fact of the plaintiff having taken a loan or loans with the respondent is not disputed. It is also not disputed that the securities named above were charged. The main dispute is on the actual debt owing and the interest charged. I have already outlined the applicant's argument that the respondent changed the interest rate several times without notice and charged a higher rate that allowed by law. The respondent on the other hand argues that the rates imposed were within the law. For the court to decide whether or not the rates were in compliance with the law, would require a mini trial in which evidence would be adduced as to what rate was applicable at what period. That

is not expected of the court at this stage. It would suffice at this stage to consider that the applicant has raised an arguable case fit for trial. I am persuaded that the applicant has established a *prima facie* case.

Whether the applicant will suffer irreparable harm.

14. Irreparable harm is that which ordinarily cannot be compensated by damages. For the plaintiff to succeed, he must show that he would suffer such loss. A party deprived of his property through an illegal process would suffer irreparable harm or damage. See **Kwanza Estates Ltd. V. Dubai Bank Kenya Ltd [2013] eKLR**.

15. In the present case the charged properties being title numbers, Naivasha/Maraigushu Block 10/4014; Naivasha/Maraigushu/Block10/4013; Naivasha/Maraigush/Block 10/1130; and Naivasha/Maralgushu/Block 10/14/98 had, until the court issued temporary orders, been put up for sale. The applicants argue that the securities have been greatly undervalued and that the manner in which the notices were issued would deny the applicant the right of redemption. The respondent on the other hand is interested in recovering the monies owed. Balancing these two interests, and considering that both the valuation and notices have been challenged, I am persuaded that the applicant shall suffer irreparable loss if they were to lose the land and later be successful in the suit. Damages alone would not be adequate remedy as the suit land would already have been sold.

16. The third principle enjoins the court where in doubt, consider the balance of convenience. I have already found that he applicant has satisfied the first two principles. If there was any doubt however, and considering the circumstances of this case as set out by the parties, the balance of convenience would tilt in favour of granting the injuction.

17. I have found that there are triable issues relating to the actual indebtedness of the plaintiff to the defendants, the value of the securities, and the interest rates applicable. It is clear to the court however, and as argued by the respondent, that the applicant does not deny owing money. There is a tacit admission by the applicant in the replying affidavit of **Lee Karuri** that they owe some **Kshs. 31,691,913.43/=** as at October 2017 as opposed to **Kshs 36, 311,018.53/=** which is being claimed by the respondent. An injunction is an equitable remedy and he who comes to equity must come with clean hands and must seek to do equity. In **Francis J.K Ichatha v Housing Finance Company of Kenya, civil application No. 108 of 2005** the court of appeal stated as follows:-

> **"A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from, his own wrong, for the plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity…."**

In the circumstances of this case, I find it just and fair that the plaintiff having admitted owing some Kshs. 31,691,913.43 subject to reconciliation, should pay the respondent the said amount.

18. In the final analysis, I allow the application in the following terms:-

(i) Pending the hearing and determination of the suit an injunction is issued to restrain the defendant, whether directly or through its servants or agents, from selling, or attempting to sell, or advertising for sale, or otherwise publicizing the intended sale of, any of the suit properties herein, namely property title numbers, Naivasha/.10/1130; and Naivasha/Maraigushu Block 10/1498,

(ii) The temporary injunction is issued subject to the condition that the applicant pays the respondent **Kshs. 31,691,913.43/=** within 30 days of the delivery of this ruling.

(iii) The costs of this application shall abide the out come of the suit.

Orders accordingly.

Ruling signed at Garsen on 23rd day of July 2018.

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R. LAGAT KORIR

JUDGE

Ruling delivered dated and Counter signed at Nakuru this 31st day of July, 2018.

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A.K NDUNGU

JUDGE

In the presence of

…………………………………..CA

……………………………………for applicant

……………………………………for respondent