REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 77 OF 2016

JAMES TITUS KISIA.....PLAINTIFF/APPLICANT

VERSUS

GUARANTY TRUST BANK (KENYA)LIMITED....DEFENDANT/RESPONDENT

RULING

1. In an application dated 30th January, 2018 brought under the provisions of Sections 1, 1A, 1B, 3, 3A of the Civil Procedure Act, Order 40 rule 1(a) and Order 50 of the Civil Procedure Rules, 2010, Sections 90(1), 90(3), 96, 103, 104, 105 and 106 of the Land Act and all other enabling provisions of the Law, the applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That pending the hearing and determination of this suit and for the purpose of preventing the wasting, damaging, alienation, sale, removal or disposition of the suit properties described as TITLES NO. MOMBASA/BLOCK/XVII/437 and MOMBASA/BLOCK XVII/816A, this Honourable Court be pleased to issue an order restraining the Defendant/Respondent by themselves, their employees, servants or agent from advertising for sale, selling, alienating or dealing in any other manner whatsoever with the said suit properties; and

(iv) That the costs of this application be awarded to the plaintiff/applicant.

2. The application is supported by the affidavits of James Titus Kisia and Silvanus Musyoki Muli sworn on 30th January, 2018. It is also anchored on the grounds in support of it. The applicant filed a supplementary affidavit on 1st March, 2018, sworn by Silvanus Musyoki Muli. The respondent filed a replying affidavit on 12th February, 2018 sworn by Joseph Machuhi, the Manager, Credit Risk Management.

3. The applicant's Counsel filed her written submissions on 15th March, 2018. The respondent's Counsel filed his on 28th March, 2018. The applicant's Counsel filed further submissions in reply to the respondent's submissions on 19th April, 2018.

4. Mr Katasi, Learned Counsel for the applicant submitted that the respondent misinterpreted the letter of offer dated 25th April, 2012. She referred to clause 6.1 of the said letter which granted the plaintiff a moratorium of 12 months within which the loan was not to accrue any interest. In Counsel's view, that was an express term of the contract which was later on violated by the respondent. She stated that the foregoing had resulted to the respondent demanding to be paid monies that are not owed by the applicant. She submitted that a statutory notice of sale dated 22nd November, 2017 was issued in which the bank made a demand of Kshs. 32,635,552.29. She made reference to the affidavit by the Auditor, Silvanus Musyoki Muli, who indicated that the applicant had fully repaid the loan and overpaid the same by Kshs. 2,541,993.83.

5. She argued that the statutory notice dated 22nd November, 2017 was invalid and unenforceable. It was her submission that the applicant had established a *prima facie* case with a probability of success from the arguments made in support of the application. She relied on the case of **Kisimani Holdings Ltd and Another vs Fidelity Bank Ltd** [2013] eKLR and **Givani Okallo Ingari and Another vs Housing Finance Company of Kenya Limited** [2007] eKLR where the court held that breach of an express term of a contract is a fetter to the equity of redemption.

6. It was stated that the replying affidavit did not rebut the deposition of the offer letter on the moratorium of twelve months but the respondent had relied on banking customs and practice which were not applicable to a contract with express terms.

7. The applicant's Counsel posited that if an injunction was to be granted, the respondent's loan facility would remain secured and none of the parties would be prejudiced. This being for the reason that the respondent has the title documents in its custody and it will be in a position to sell the property if it emerges successful once the suit is heard and determined. Counsel cited the case of **Olympic Sports House Ltd. vs School Equipment Center Limited** [2012] eKLR to show that it is not always mandatory for an injunction not to issue where damages are an adequate remedy.

8. Ms Katasi reiterated that the applicant had fully paid the loan and he is entitled to his property as his rights have crystallized. She invited the court to look at the provisions of Sections 102, 103 and 103 of the Land Act, 2012.

9. On the issue of the suit properties not being mentioned in the plaint or the amended plaint, she stated that they are mentioned in the charge instrument. She submitted that the case revolves around a demand for money that is not due to the respondent. She prayed for an injunction to be granted pending the hearing and determination of the main suit.

10. Mr. Juma Learned Counsel for the respondent stated that the application is defective and should be struck out for being anchored on the provisions of Order 40 rule 1 instead of Order 40 rule 2 of the Civil Procedure Rules. He pointed out that the subject properties were not mentioned in the suit as being in dispute or that the properties were in danger of alienation to defeat the decree.

11. Counsel submitted that an order for an injunction must be sought in the main suit but no such order was sought in the plaint. It was argued that if the court grants an interim injunction and the applicant succeeds in the suit, the court will not be able to grant a prohibitory injunction against the respondent. He cited the case of **Kihara vs Barclays Bank (K) Ltd** [2001] 2 EA 423- 424 and **Mary Ngaru vs Family Bank Ltd and 2 Others** [2014] eKLR, to support his argument.

12. Counsel further submitted that the issue of the validity of the statutory notice was not pleaded in the suit and does not form the subject of the application, thus there was no basis to establish a *prima facie* case with a probability of success. He cited the case of **Air Travel and Related Studies Ltd. vs Equity Bank (Kenya) Limited** [2017] eKLR to show that an injunction sought at interlocutory stage must bear some relationship with the cause of action pleaded in the plaint.

13. It was submitted that the applicant had defaulted in payment of the loan, yet he was saying that he had overpaid the loan. Counsel for the respondent cited the case of **Mrao Ltd vs First American Bank of Kenya Ltd and 2 Others** [2003] eKLR and **Fina Bank Limited vs Ronak Ltd** [2001] 1 EA 64 to show that the issue of accounts cannot be the sole reason for restraining a chargee from exercising its statutory power of sale.

14. Reference was made to paragraph 6-18 of the replying affidavit which rebut the deposition by the applicant that he had paid the loan. It was stated that the applicant defaulted in payment of the loan and that the annexures marked JM4 and JM6 contain evidence of the said assertion. It was stated that the applicant requested for loan restructuring.

15. Mr. Juma argued that even if was to be assumed that a moratorium was given to the applicant, the amount due would have been Kshs. 73,358,298/= but the applicant had paid Kshs. 53,595,992.23. It was submitted that the applicant claims to have paid the principle amount of Kshs. 50,000,000/= and Kshs. 3,000,000/= but the said amount does not factor in interest and penalties. It was argued that the applicant should have tendered in evidence of actual payment made and not an analysis by a third party of payments made. Counsel made reference to the case of **Sammy Japheth Kavuku vs Equity Bank Ltd and Another** [2014] eKLR to emphasize that an injunction should not be given where there is no evidence of payment having been made.

16. It was also submitted that the applicant had not shown how he will suffer irreparable loss. On the principle of a balance of convenience, it was stated that if the orders sought are granted, the sum owed by the applicant might end up outgrowing the value of the properties in issue. He prayed for the application to be struck out with costs.

17. In response to the foregoing submissions, Ms Katasi stated that the overall object of Order 40 of the Civil Procedure Rules is to protect properties from alienation, which issues had been addressed in paragraphs 6, 7, 8, 9, 10 and 11 of the applicant's affidavit.

18. She urged the court to invoke the provisions of Article 159(2)(d) of the Constitution of Kenya to cure any defect in the application. She also cited the provisions of Order 51 rule 10 of the Civil Procedure Rule that states that an application shall not be defeated due to want in form.

19. In demonstrating that the applicant's application bore semblance to the main suit, as was stated in the case **Air travel Related Studies Ltd vs Equity Bank (Kenya) Limited** (supra), Counsel submitted that the applicant in this suit seeks damages for breach of contract.

20. It was stated that the Auditor whom the applicant relied on, used figures obtained from documents availed by the respondent to calculate the amount paid. She referred the court to paragraphs 5, 6, 7 and 8 of his affidavit. She indicated that the bank did not give a statement to show how it arrived at the sum of Kshs. 32,635,552.29. She concluded by stating that the applicant had discharged the legal burden of proof under the provisions of Section 107 of the Evidence Act.

ANALYSIS IS AND DETERMINATION

The issue for determination is if the applicant is deserving of the orders of an interlocutory injunction.

21. This court will first address the submission raised by the respondent's Counsel to the effect that the suit bears no semblance to the present application. I have perused the plaint filed on the 28th July, 2016 it indeed makes no mention of the notices dated 17th April, 2014 and 3rd June, 2016 addressed to the applicant informing him that he had defaulted in payment of the loan. The plaint does not also contain a prayer

for an injunctive relief.

22. The application herein seeks an order for an injunction pending the hearing and determination of the suit and for preventing the wasting, damaging, alienation, sale, removal or disposition of Titles Mombasa/Block XVIII/437 and Mombasa /Block XVII/816A.

23. It was also stated by the respondent's Counsel that the description of the titles of the subject properties are not given in the plaint. That is indeed the position. The court however notes that the description of the two properties is given in the present application. This court is of the considered view that failure to describe the properties the subject of the dispute herein cannot lead to the striking out of a suit as this case is still at its early stages of hearing. The applicant still has a leeway to move the court for an order to amend the plaint.

24. In making an analogy from one of the recently concluded Court of Appeal decisions on election petitions, which addressed the issue of striking out an election petition for failure by a petitioner to disclose election results, the court in the case of **Martha Wangari Karua vs IEBC and 3 Others** [2018] eKLR, stated as follows:-

> ***"It should be noted that failure to comply with the provisions of rule 8(1) per se does not mean that the petition is invalid. The remedies provided by the Constitution and the statute, the words under Article 159(2)(d) are unambiguous and mean that, unless the results of the election and date of the declaration cannot be ascertained or determined from the materials filed by the parties, the condition is satisfied. In our judgment, the reason is that these provisions have to cover a number of different situations specified and any other construction is wholly inappropriate. Nothing in the language of the statute suggests that the documents in the file courtesy of any other party other than the petitioner can or should be ignored as the basis of giving life to rule 8(1)(c) and (d)."***

25. The Court of Appeal in the above election petition held that disclosure of results of the election and date of the declaration in an election petition was not a mandatory requirement as long as the said information could be garnered from affidavits or documents relied on by any of the parties to an election petition.

26. This court applies the *ratio decidendi* in the above case to the suit herein. The list of documents filed by the applicant and in particular, the application herein, and the statutory notices from the respondent do bear the land reference numbers of the charged properties. There is no strict rule of law that states that in each and every plaint, an order for an injunction must be sought. Circumstances that arise in the course of proceedings may lead to injunctive orders being sought. A reading of the present application, the affidavit by the applicant and the annexures thereto leave no doubt that they bear a remarkable semblance to the plaint and the averments addressed therein. I therefore decline to strike out the suit herein.

27. I also decline to strike out the application dated 30th January, 2018 on the argument that the application is grounded on the provisions of Order 40 rule 1(a) and not Order 40 rule 2 of the Civil Procedure Rules as submitted by the respondent's Counsel. The foregoing is a procedural technicality and the provisions of Article 159(2)(d) of the Constitution apply to cure the said defect.

28. The supporting affidavit of the applicant indicates that his understanding of clause 6.1 of the letter of offer from the respondent was to the effect that the interest payable on the loan advanced was to be effected 12 months after the initial drawdown. In his view, the respondent failed to factor in the moratorium in computation of the amount due, and by so doing the respondent overstated the account.

29. The applicant also relies on the supporting affidavit of Silvanus Musyoka Muli who audited the accounts with regard to the amounts the applicant paid to the respondent *vis a vis* the amount being claimed.

30. The respondent in its replying affidavit articulated its case and alleges that the applicant misunderstood the terms of the letter of offer and had not worked out the disbursements and interest due accurately. In paragraph 13(iv) thereof, the respondent makes mention of Kshs. 10,631,269.20 which had been received from the applicant's children but which was refunded to them on 13th May, 2014 after they complained. The respondent relied on the annexures marked as JM4(a) and JM4(b) and JM5, which indicate that the applicant requested for the restructuring of the facility and the request was acceded to.

31. The principles upon which an injunction can be granted were well articulated in the case of **Giella vs Cassman Brown and Co. Ltd** [1973] EA 358, which states as follows:-

> ***"The conditions for granting a temporary injunction in East Africa are well known and these are first the applicant must show a prima face case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might other 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."***

32. In his supplementary affidavit, the deponent Silvanus Musyoka Muli addresses the issue of interpretation of the express terms of clause 6.1 of the letter of offer and once again, refers to the accounts of the applicant's children. The impression created by the said deposition with regard to the maintenance of the account for the applicant is that the respondent did not strictly keep the applicant's accounts independently but went further to encroach on the applicant's children's account in an effort to recover the amounts owed to it by the applicant. Although the respondent states that it refunded the amounts it had erroneously debited from the children's account, this leads to the question of how many other arithmetical blunders the respondent may have committed in computation of the loan due and owing from the applicant.

33. The applicant went a step further to engage the services of Silvanus Musyoka Muli to audit the statement of accounts of the applicant *viz a viz* the amounts demanded by the respondent. This court notes that the said statements of accounts are addressed to the applicant and originate from Fina Bank (respondent) and are therefore valid documents for purposes of computation of the amounts owing and amounts paid to the bank.

34. In the face of the depositions by the parties hereto and considering their written submissions and authorities relied upon, it is my finding that a *prima facie* case has been established with a probability of success. Given the circumstances of this case, if this court does not grant the order for an injunction, the applicant stands to suffer irreparable loss as his securities will be sold whereas he may indeed have fully repaid the loan. If such a situation was to arise, this court would have perpetrated an injustice. In the case of **Olympic Sports House Limited vs School Equipment Center Limited** (supra) the court stated that damages is not an automatic remedy when deciding whether or not to grant an injunction as damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law.

35. In conclusion, the balance of convenience tilts in favour of the applicant. The orders sought in the application dated 30th January, 2018 are hereby granted to the applicant in the following terms:-

(i) That pending the hearing and determination of this suit and for the purpose of preventing the wasting, damaging, alienation, sale removal or disposition of the suit properties described as TITLES NO. MOMBASA/BLOCK/XVII/437 and MOMBASA/BLOCK XVII/816A, this Honourable Court hereby issues an order restraining the Defendant/Respondent by themselves, their employees, servants or agent from advertising for sale, selling, alienating or dealing in any other manner whatsoever with the said suit properties; and

(ii) Costs are awarded to the applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff/applicant

No appearance for the defendant/respondent

Mr. Oliver Musundi - Court Assistant