REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.527 OF 2013

PALMY COMPANY LIMITED .....PLAINTIFF/APPLICANT

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT/ RESPONDENT

RULING

1. Before this Court the Notice of Motion dated **21st January 2019** by which **PALMY COMPANY LIMITED** (the Plaintiff/Applicant) seeks for orders that**:-**

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. An order of temporary injunction be issued to restrain the Defendant herein either by itself, its servants and/or agents or anyone of them whatsoever from advertising for sale, selling whether by public auction, private treaty or otherwise or in any other way disposing of or alienating or interfering with the property Grant Number I.R 70243 land Reference Number 209/11043 pending hearing and determination of the suit filed herein.**
>
> **4. An order that the Defendant produces adequate, honest and up to date accounts and records of all monies received from the Plaintiff towards the repayment of the loan granted to it and which is the subject of the charged property Grant Number I.R 70243 Land Reference Number 209/11043.**
>
> **5. An order that parties jointly appoint an auditor to prepare statement of accounts to confirm the correct outstanding sum.**
>
> **6. Costs of this Application be provided for.**

2. The application which was premised upon **Sections 1A, 1B** of the **Civil Procedure Act, Order 40 Rules 1(a)** and **4** of the **Civil Procedure Rules 2010** was supported by the Affidavit of even date sworn by **MARTIN MANYARA** a Director of the Plaintiff Company.

3. The Defendant/Respondent, **CONSOLIDATED BANK OF KENYA LIMITED** opposed the application and in doing so relied upon the Replying Affidavit dated **28th February 2019** sworn by **DANIEL KIMAIYO** a Debt Recovery Officer with the Bank. Pursuant to directions given by this Court, the application was canvassed by way of written submissions. The Plaintiff/Applicant filed its written submissions on **18th April 2018**, whilst the Respondent Bank filed its submissions on **9th May 2019.**

BACKGROUND

4. By way of a letter of offer dated **11th January 2011** the Respondent Bank agreed to advance to the Plaintiff/Applicant a loan facility in the amount of **Kshs.27,000,000**. The facility was to be utilized for purpose of construction of residential flats for rent on **L.R. NO.209/11043, I.R NO.70243, Villa Franca Nairobi County** (hereinafter referred to as the **"suit property").** Interest on the said facility was to be at 13.75% per annum and in case of default interest would be charged on the outstanding amount at 18% per annum. The facility was to be repaid within 180 months by way of payment of **Kshs.373,276/=** per month (inclusive of interest). In order to secure the above facility the Plaintiff/Applicant executed a Charge dated **21st January 2011** over the suit property.

5. Subsequently the Plaintiff/Applicant sought a further loan facility of **Kshs.8,000,000/=** from the Respondent Bank. This brought the total facility granted to the Plaintiff/Applicant to a total of **Kshs.35,000,000**. In order to secure this second facility the Plaintiff executed a Further Charge dated **29th February 2012** over the suit property. The interest payable was to be charged at 25% per annum and in case of default the interest would be 18% on the outstanding arrears. This consolidated facility was to be paid within 180 months at a rate of **Kshs.742,837/=** per month (inclusive of interest).

6. By March 2012 the Plaintiff/Applicant defaulted in making the repayments as had been agreed. The Respondent Bank moved to exercise its statutory power of sale under the Land Act. However the Plaintiff filed a suit challenging the Banks move to sell the suit property and by the Ruling dated **6th June 2014 Hon Justice Gikonyo** found that the notification of sale issued to the Plaintiff/Applicant was defective. Accordingly the Respondent Bank was restrained from proceeding with the intended sale.

7. The parties entered into a consent dated **22nd February 2014,** by which the Plaintiff/Applicant sold two Apartments for **Kshs.10,000,000/=.** The Plaintiff/Applicant avers that the proceeds of this sale were put towards reducing the loan balance an allegation which the Respondent Bank strenuously denies.

8. The Plaintiff/Applicant continued to be in default and on **3rd August 2018,** the Respondent bank issued a second Statutory Notice demanding payment of **Kshs.86,447,022**. A 40 day Notice of Intention to sell was issued on **14th December 2018**. The Plaintiff/Applicant then filed the instant application seeking injunctive orders to prevent the sale of the suit property.

ANALYSIS AND DETERMINATION

9. The grounds upon which an interlocutory injunction may be granted were espoused in the case of **GIELLA –VS- CASMAN BROWN 1973 E.A 358** in which the Court held:-

> **"…an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally the 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 a balance of convenience."**

10. Likewise in **LUCY WANGUI GACHARA –VS- MINUNDI OKEMBA LORE [2015] eKLR,** the Court of Appeal sitting in Malindi stated as follows:-

> **"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:**
>
> **a. Establish his case only at prima facie level.**
>
> **b. Demonstrate irreparable injury if a temporary injunction is not granted and;**
>
> **c. Allay any doubt as to (b) by showing that the balance of convenience is in his favour.**
>
> **These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially."**

PRIMA FACIE CASE

11. In order to merit the injunctive orders it seeks the Plaintiff/Applicant must demonstrate that it has a prima facie case with a probability of success at trial. The definition of a **"prima facie"** case was given by the Court of Appeal in the case of **MRAO –VS- FIRST AMERICAN BANK OF KENYA 2003 eKLR** where it was held as follows:

> **"……a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case succeeding upon trial…it is a case which, on the material presented to the court, a tribunal properly directing itself will include that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter…."**

12. The Applicant does not deny and indeed confirms having received the loan facility in question from the Respondent Bank. The fact that the loan facility is in arrears is also not denied. What the Applicant disputes is the amount which the Respondent claims as due and owing to the bank. Whereas the Bank claims that as at **3rd August 2018** an amount of **Kshs.86,447,022/=** was owed by the Applicant, the Applicant disputes this figure and claims that the outstanding loan amount due and owing to the bank is **Kshs.66,237,823.94.** By conceding to this amount as due and owing the Plaintiff/Applicant has in effect confirmed its indebtedness to the bank.

13. It is a general principle that where there exists a dispute over figures an injunction will not normally be granted. In the case of **Khalid Yamin Vs Equity Bank Limited & Another [2018]eKLR** the Court addressed itself on the aforesaid issue of disputed interest rate not being automatic condition for the grant of an interlocutory injunction as follows:-

> **"I have noted from the documents attached to the Replying Affidavit that the Plaintiffs had admitted their indebtedness to the 1st Defendant and made several proposals to settle the same. What the Plaintiffs are contesting in my view are accounts.**

In the case of Princillah Krobought Grant Vs Kenya Commercial Finance Co. Ltd and 2 Others, Court of Appeal at Nairobi, Civil Application No.Nai 227 of 1995 (108/95 V.R), the Court stated as follows:-

"Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgage from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage.

14. Similarly in the Court of Appeal case of **Fina Bank Ltd Vs Ronak Ltd, [2001] 1 EA 54** the Court stated that a dispute on accounts was not a basis for grant of an injunction. The court stated as follows on the issue of disputed interest rate:

"…As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates at its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."

15. The Plaintiff/Applicant herein has not challenged the statutory notices issued to it. On the whole I am satisfied that no prima facie case has been established. Having thus failed to establish a prima facie case, the court need not consider the other two limbs set out in the ruling in **Giella –Vs- Casman Brown**.

16. In **LUCY WANGUI GACHARA –VS- MINUNDI OKEMBA LORE [2015]eKLR,** the Court of Appeal sitting in Malindi held as follows:-

"If a prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

However for purpose of completeness I will proceed to consider the other two limbs.

IRREPARABLE INJURY

17. The Plaintiff/Applicant pleads that they are likely to suffer irreparable harm if the interim orders sought are not granted, for which damages would not be an adequate remedy. It is argued that if the suit properties are sold by auction then the Applicant will lose a substantial investment and will in fact be deprived of the means to service the loan facility. The Respondent counters that any loss the Plaintiffs may suffer arising from the sale of the disputed properties is quantifiable and can be compensated by an award of damages, and that the bank being a financial institution is capable of paying any damages ordered by the Court. The Respondent Bank finally submits that if they are restrained by way of an injunction from exercising its statutory power of sale over the charged Apartment there exists a very real risk that the outstanding loan amount may eventually outstrip the value of the charged property.

18. In **Nyeri Civil Suit No.11 of 2014 Nairobi Kiru Line Services Ltd Vs. County Government Nyeri & 2 others [2016] eKLR** the Court while placing reliance on a passage from **Hallsbury's Laws of England**, described irreparable loss in the following terms:-

"…By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that they may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages…

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm". Robert Sharpe, in "*Injunctions and Specific Performance,*" states that "*irreparable harm*" has not been given a definition of universal application; its meaning takes shape in the context of each particular case."[own emphasis]

I am in agreement with the Respondent Bank that any loss which the Plaintiff/Applicant may suffer is indeed quantifiable and can be adequately compensated by an award of damages.

BALANCE OF CONVENIENCE

19. The Plaintiff/Applicant submits that the balance of convenience tilts in their favour. They submit that all that is required to settle the dispute would be the appointment of an independent auditor to determine the correct amount due and owing to the Bank. That the Plaintiff has demonstrated a clear intention to repay in full its loan facility.

20. However under the terms of the Agreement between the parties the Respondent Bank reserved its right to charge interest at its discretion and was not obliged to advise the Plaintiff of any change of interest. Clause 31-3 of the Charge dated **21st January 2011** provided that:-

"The Bank shall in its sole discretion determine the rate or rates and methods of calculating the interest applicable from time to time with full power and authority to the Bank to charge different rates for different accounts and/or transactions."

21. Further as stated earlier a dispute over accounts is not sufficient grounds upon which to grant an interlocutory injunction. In his ruling dated **6th June 2014** my learned brother **Hon Justice Gikonyo** stated thus:-

> **"Unless there are other agent grounds, disputes on the amounts owing or interest charged will not be the sole basis for grant of an injunction."**

22. The Plaintiff/Applicant's submission that it has always been ready and willing to clear its liability to the bank is belied by its previous conduct in this matter as several commitments made by the Plaintiff/Applicant in this regard were not honoured. As a general rule courts are reluctant to interfere with a proper exercise of a Banks statutory power of sale against serial defaulters. In the **AMICARE TRAVEL SERVICES LTD –VS- ALIOS KENYA FINANCE LIMITED [2014] eKLR**, the Court reiterated a financiers rights of re-possession upon default in the following terms:-

> **"The Plaintiff and the Defendant voluntarily entered into a contract which regulated and continues to regulate their relationship. Restraining the Defendant from exercising its right under the Agreement would be tantamount to the Court infringing on the Defendant's right to repossession of the vehicles when the Plaintiff had defaulted in the payment of the installments as and when the same became due. The Plaintiff cannot fail to meet its financial obligations to the Defendant and still expect to retain the said vehicles. It must either pay the monies as it still has the right of redemption or return the same. It cannot have its cake and eat it too."**

23. It must be remembered that this was a facility which was granted to the Plaintiff/Applicant way back in the year 2012 and since March 2012 the Plaintiff/Applicant has been in default. The bank has been waiting for over 7 years to recover the monies due to it. I cannot agree more with the words of **Hon Justice Warsame** (as he then was) in the case of **KYUNDAI MOTORS KENYA LIMITED –VS- EAST AFRICAN DEVELOPMENT BANK LTD [2007]eKLR**, where he aptly stated as follows:-

> **"The application in my view epitomizes the resolute nature of the Applicant and its utter contravention of the require-ment of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the charge document. It admits and acknowledges a debt of Kshs.100 million. There is persistent default but it wants to use every trick on earth to restrain the order to postpone the day of reckoning. <u>They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the Applicant</u>. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot."** [emphasis mine]

I find that the balance of convenience tilts in favour of the Respondent Bank.

24. Based on the foregoing I find no merit in this application for an injunction. Accordingly I decline to grant prayer (3) of the Notice of Motion dated **21st January 2019**. Costs are awarded to the Defendant/Respondent.

Dated in Nairobi this 29th day of November 2019.

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Justice Maureen A. Odero