REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

HCCC NO. 44 OF 2018

SON HARDWARE LTD ……..……PLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA LTD……DEFENDANT

RULING

This is Notice of Motion filed in Court on 3rd December, 2018 pursuant to Order 40 Rule 1 and 2 of the court Procedure Rules seeks the following Orders:-

> **(a) That pending the hearing and final determination of this suit an order of injunction to issue restraining the defendant whether by itself, its agents, servants, officials, nominees or otherwise from selling, advertising for sale, alienating, charging, disposing or in away whatsoever interfering with the plaintiff's properties known as L.R. No. Ngong/Ngong/3363/24258**
>
> **(b) That this honourable court be pleased to commission a qualified accountant to take accounts of the plaintiff's true and just indebtness with the defendant and report to this Honourable court.**
>
> **(c) That pending the taking of such accounts, the plaintiff be allowed to liquidate the loan by monthly instalments of Kshs.250.000/- and the sale scheduled for 18th December, 2018 be suspended.**

In support of the Application is an amended Affidavit of Peter Mainani Juma dated the same day.

The factual matrix

The applicant Son Hardware is a registered Company and proprietor of property referred as LR. NGONG/NGONG/33632, 24258/ONGATA RONGAI, Kajiado County. The dispute has its origins in debt owed by the Son Hardware Limited to Development Bank of Kenya Limited.

The Loan amount was guaranteed in the form of the Legal charge NGONG/NGONG 24258/33632, all assets debenture of the Company, Directors, Joint and several guarantors and Deed of assignment of Rental income of the said property. The Agreement recited indicates that the further loan facility were advanced with a legal Charge on LR. NGONG/NGONG/33632 as at April, 2015. Under the terms of the Loan agreement the parties to restructure the original debt with a new term loan of cash Kshs. 40,434,493.82 on 19th September, 2017. The terms and purpose of the new Loan facility include Limit amount of Cash of 40,434,494.82. This arising from consolidation of existing term loan 1 of cash Kshs.31,929,891.73 existing term loan 2 of cash Kshs. 2,153,491.08 and arrears of cash Kshs,6,351,111.61. Securities held all assets debenture for cash Kshs. 8,200,000 in favour of Development Bank of Kenya.

A further Debenture for cash Kshs. 43,000,000/= in favour of Development Bank of Kenya. A second further debenture for Kshs. 5,700,000.00 in favour of Development Bank Of Kenya. A first Legal Charge of cash Kshs. 8,200,000.00 over Commercial cum residential property LR. NGONG/NGONG/24258 a formal Legal charge for cash Kshs. 4,300,000.00 over property LR. NONG/NGONG/33632. A Second Legal Charge of cash Kshs. 12,500,000.00 over LR. NGONG/NGON/33632 in favour of Development Bank, of Kenya a deed of assignment of rental income LR. NGONG/NGONG/33632.

According to the Defendant Bank the debt due and owing stood at KShs. 49,129,343.40. The Defendant Bank through their legal manager Doreen Kimori depones in her Replying Affidavit that the Plaintiff is in default of the loan agreement necessitating the recall of the Principal and the interest chargeable under the agreement. That as a result on 26th July, 2017 the Defendant Bank issued 90 days statutory notices under section 90, 96 (1) of the Land Act and Section 96 (2) of the Land Registration Act through registered post of the last known address of the Plaintiff. The Defendant Bank points out that on 17th November, 2017 the forty days' notice to sell was issued to the Plaintiff Company which forced them to seek audience for a restructuring of the entire debt. As a result the Defendant Bank secured the new Loan facilities

with further legal charge against the same registered properties.

Further the Defendant Bank contends that a market valuation of both properties LR NGONG/NGONG/24258 AND 33632 was carried out by Tysons Limited. The valuation itemized various pricing of the properties. The effect of all these was that the Defendant Bank issued instructions to Garam investments who issued 45 day redemption notice dated 12th October, 2018 together with notification of sale.

The undertaking of the defendant bank agreement with the plaintiff was that the restructured loan did set out the payment terms which hitherto have been breached rendering the exercise of statutory power of sale as of right.

The Plaintiff Submissions

Mr. Masaviru on behalf of the plaintiff company submitted that the said default has not arisen to warrant the defendant bank to exercise statutory power of sale. That from the letters of offer the defendant bank failed to disburse the agreed loan amount save for Kshs. 10,000,000. Learned counsel argued that the restructured loan and securities offered should be considered against the background that LR. Ngong/Ngong 24258 remains discharged. Learned counsel further submitted that the defendant in advertising the property for sale it is in breach of Section 97(2) of the Land Act on the failure to conduct a forced sale valuation. He referred me to the principles in the cases of ***David Ngugi Ngaari v KCB 2015 eKLR, Charles Alex Njoroge v National Bank of Kenya Ltd Nbi Commercial Division No. 179 of 2014, East African Venter Co. Ltd v Agricultural Finance Co-operation Ltd, ELC Case No. 287 of 2017, Giella v Cassman Brown*** for the well-known test for the grant of interlocutory injunctions.

Defendant's submissions

Ms. Bosibori made submissions on behalf the defendant bank. According to counsel in the instant case there are no grounds to enable this court correctly apply its mind to grant the application. With regard to the loan agreement Ms. Bosibori invited the court to construe and interpret the agreement which correctly reveals that the debt demanded is due and owing. Further Ms. Bosibori argued that the plaintiff company is seeking an interlocutory injunction to restrain the defendant bank when the amount stated remains unpaid. In buttressing her submissions counsel place reliance on the principles in the cases of ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others 2003 eKLR***, ***Simon Njoroge Mburu v Consolidated Bank of Kenya 2014 eKLR, Olive Farm Ltd v Family Bank Ltd 2015 eKLR, Malenya v Housing Finance of Kenya Ltd & another 2003 EA, Peter Kamau Kiriba v City Council of Nairobi & 3 Others [2015] eKLR.*** Learned counsel urged this court to find that there is no merit in the application.

Discussion and determination

Pursuant to order 40 rule 2 of the Civil Procedure Rules a court may make orders to grant such injunction to restrain breach of contract or other injury on such terms as to an inquiry as to damages, the duration of the injunction, taking into account, the giving security for damages or otherwise as the court thinks fit.

In this regard I accept that an injunction is an equitable remedy targeted at restraining another person from doing such act or make such order on alienation, sale, removal or disposition of the property until the determination of the suit on the merits. For the grant of the reliefs of injunction certain principles have been developed in law to guide courts of equity to decline or grant such orders. The well settled principles upon which the court's exercises their jurisdiction in this regard are as stated in ***Giella V Cassman Brown [1973] EA, Mrao Ltd v First American Bank Kenya Ltd & 2 Others 2003 EKLR and Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 87*** where the courts have held thus:"***The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is:***

> ***(a) Whether the applicant has laid out a prima facie case with a probability of success, (b) whether the applicant might suffer irreparable injury not compensated by way of damages if the injunction are not granted and if there is doubt whether the balance of commercial favours the applicant.***

In Mrao case the court reiterated the essence of a prima facie case where it observed:

> "***I would say that in civil cases it is a case which on the moment presented to the court or 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. Therefore the first hurdle an applicant must satisfy in order to be granted an injunction is to show existence of a prima facie case grounded on a legal right deserving of protection."***

In approaching this motion I am of the view that serous substantial issues to be tried at the hearing should underpin the courts discretion to grant interlocutory injunction. **Halsbury's Laws of England 4th Edition paragraph 863** illuminates the foregoing position as follows:

> "***Interim injunctions are generally granted only when the applicant has established a serious issue to be tried, damages will not be adequate remedy, the balance of convenience lies in favour of granting the interlocutory in that it will do more good than harm and the applicant is and will be able to compensate the respondent for any loss which the order may cause him in the event that it is later adjudged that the injunction should not have been granted"***

In the instant application the plaintiff company does assert that it has paid the facilities so granted, which even culminated in the discharge of charge on LR. Ngong/Ngong/24258. Further the defendant bank in their replying affidavit is a statement made on oath confirming that the plaintiff company is in default of repaying the loan amount. To this end the defendant bank annexed statement of accounts marked as DK-SM 4,6(c), (0) and(d) to show in reality the account is in arrears.

A general rule on mortgage contracts is that the mortgagor cannot be restrained to exercise his, rights under the legal charge if the amount claimed is due and owing as stipulated in the instrument. The plaintiff company contends that the statutory power of sale in respect of the restructured loan facilities is yet to crystalize. On the other hand the defendant bank depones that the legal charges do not secure any specific credit facilities. From the position of the defendant bank the loan facilities under the restructured scheme were contractually partly secured by the legal charges over the suit properties. In essence therefore the validity of the statutory notice dated 26th July, 2017 for having been issued on the strength of the legal charges demanding payment should not be impugned.

First I have weighed the rival submissions of both counsels within a textual analysis of the relevant provisions and a consideration of the legal principles contemplated by the law in granting temporary injunctions. Secondly, whether pursuant to the validity of the mortgage contract there is doubt as to the existence of the statutory power of sale in the circumstances and facts of this claim. Having set out the rival arguments it is now my turn to express my take of the application.

In my view there is no contention as to the enforceability of the legal charges registered in favour of the defendant bank. As a matter of fact despite the dispute on accounts the statutory notice dated 26th July, 2017 does comply with the requirements of Section 90(1) of the Land Act 2012. The particulars required by these provisions of law to be contained in a statutory notice have been captured therein. The clear language of the letters of offer as to the nature and structure of the facilities granted and secured by the various charges, guarantees, deed of assignment and debentures as well as the provisions of each charge as what constitutes the secured obligations in the contract render it difficult for this court to follow the plaintiffs allegations on the claim.

In my opinion even where there is a procedural defect as to the service and validity of the statutory notice, without more it does not render it unenforceable. Why do I say so the court is clothed with discretion to the effect of not restraining the mortgagor from exercising its statutory power of sale but to direct that a compliant statutory notice be issued. This legal proposition found its way in the case of ***National Bank of Kenya Ltd v Shiners Plaza Ltd [2009]EKLR*** where the court held:

> ***"An injunction is an equitable remedy we venture to say that where the court is entitled to grant an interlocutory order restraining a mortgagee from exercising its statutory power on ground that the mortgagee has not issued a valid notice, then in our view, the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law"***

With respect to the facts of this case if that were so the court would in effect issue appropriate orders varying the statutory notice or declare them void as a consequence of the contravention of the provisions of Section 90 (1) of the Land Act. As for this case I find no basis for challenging the statutory notice required to be issued by the mortgagor under Section 90 of the Land Act. On this grounds no serious question arises to warrant exercise of discretion for grant of interlocutory injunction sought by the plaintiff company.

It is also disputed that the defendant bank has not complied with section 97 of the Land Act which places an obligation to obtain a forced sale valuation on the charge before exercising the power of sale. The Auctioneers Rules 2007 at Rule 11(1) (b) and (c) requires that a valuation to be relied upon before the exercise of a mortgagor statutory power of sale be not more than twelve months old. In the replying affidavit of the representation of the defendant bank it contains Annexure DKC 6 being a copy of the valuation report in respect of LR. Ngong/Ngong/24258 and LR. Ngong/Ngong/33632 both dated 6th April, 2018.

We therefore have the evidence with regard to the value of the suit properties as at the date the 45 days was being issued by the Auctioneer. Fortunately the misconception by the plaintiff company on this issue has been laid to rest by the decision of the court in the case of ***Stephen Kipkaitan Kenuiywa T/A Kapchebet Farm v Sidian Bank Ltd & another [2017] EKLR.*** I find no evidence that the mortgagor in realizing the securities acted in haste and without due diligence that he failed to comply with Section 97 (2) of the Act.

The other matter which must be dealt with as submitted by the plaintiff company relates to the issue whether the power of sale is a fraud. The type of claim which is described in the pleadings is a negotiated arrangement between the borrower and the lender. There is an indication from the submissions made by the plaintiff company that a specific amount was borrowed but the defendant bank advanced less than the entitlement in the letter of offer. As the plaintiff company pointed out this breach made it difficult in servicing the loan and thereby the default complained of was contributed by the defendant bank.

As one author Mark Bradshaw wrote in his **article on injunctions a practical guide to one of the laws most powerful tools** where he observed that "***injunction proceedings are high stakes poker if a party prays it's first hand wrong, the game may be over before hand is dealt."*** This is more so because interlocutory injunction are normally signed before the final determination of the main dispute. This powerful legal tool main purpose is to determine the rights of the parties at an interim period for them to maintain status quo pending trial.

On the issue of fraud the plaintiff company submissions is an attempt to rectify the situation through grant of an injunction. Even on this ground, the general requirement is that the applicant must establish sufficient likelihood of success for granting of the relief pending final outcome of the main suit.

In the case of ***Wenard Electrics Pray ltd v Hatmax Mortgage Management Ltd NSWSO [1994]*** I think Young J. correctly pointed out as follows:

> ***"It may be that the principle does not go that far, because the popular Homes case involved a mortgagee who is unable to advance the full amount because it itself went into liquidation, but certainly there is that matter which is arguable. Even if the equity was called into play in this case there must be a question as to whether its existence affects the power of sale. It seems to me that the Auctioneer of sale is not to be exercised in circumstances where there would be a fraud on the power to exercise it circumstances where the mortgagee itself has been guilty of conduct which strongly contributed to the mortgagee's default, which default is the basis for the power of sale. There is no time to explore this matter fully. I will assume for the present purposes that there is an arguable case by the mortgagee for relief"***

In applying the above principles as in transpired in this instance the right of the defendant bank over the property created an equitable mortgage over the land the interest held by the plaintiff company. The collateral legal charge provided by the plaintiff company was on monies advanced due and owing. The defendant bank power to sell the mortgaged properties is under pinned in the default clause of the terms and conditions in the legal charge duty charged in favour of the defendant bank. If the loan advanced fell in arrears there is nothing to stop the defendant bank from demanding both the principal and interest of the outstanding balance.

To deal with the breach of the terms and conditions of the loan agreement prior to the issuing of the statutory notice remains an arguable case for which the plaintiff can seek damages.

The defendant bank is capable of compensating the plaintiff company on such terms as may be ordered by the court for breach of contract. I agree with the judgement of the English court in ***Bates v Lord Hailsahm [1972] 3 ALR*** where the court stated:

> "***An injunction is a serious matter, and must be treated seriously. If there is a plaintiff who has known about a proposal for ten weeks; the general terms and for nearly four weeks in detail and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over fortnight, he must have a most cogent explanation if he is to obtain his injunction made two and half hours before the meeting is due to begin"***

In the present case the assertion of a fraudulent claim on the part of the defendant bank did not just emerge within the power of sale arose under Section 90(1) of the Land Act. There is no express or implied admissions of the matters mentioned on this issue by the defendant bank. The accuracy or correctness of the allegations set out therein are yet to be ascertained.

I am satisfied that this does not qualify as a serious issue to move this court to grant an interlocutory injunction. I think with great respect to the plaintiff counsel if this was a legal issue of substance it should have been litigated before foreclosure proceedings on the mortgage contract. This ground also fails against which this court can exercise discretion to grant an injunction. The practical impact on this is that damages would be an adequate remedy for the plaintiff company if the claim succeeds at the main trial.

It cannot be said that the defendant bank is in breach of the contract terms just because it has invoked the process of recovering the debt from the plaintiff company. I have no hesitation to find that the plaintiff was fully aware of the issues it is raising in the application for interlocutory injunction. I am satisfied that the mandatory 40 days and the 45 days redemption notice has been served upon the defendant bank through its last known postal address under Section 96 of the Land Act. To this extreme, I find that under the grounding principles in ***Giela v Cassman Brown (supra) and Ngaruman Ltd, Jan Nillsen & 2 others [2014] EKLR*** the plaintiff bank has not met the threshold to persuade this court exercise discretion in its favour.

Finally, with regard to the application on order 40 of the civil procedure rules failure to proffer or provide an adequate undertaking as to damages weighs heavily against granting the interlocutory injunction. It is evident from the content of the application itself and the arguments of counsel it does not sound that he has put forth an undertaking for damages as required by the Rules.

I hold a strong view that it was desirable for the plaintiff company to sufficiently answer the following questions for the court to exercise discretion in favour of an injunction that is:

(a) Is there a serious question to be tried?

(b) Is there a reason for the urgency to maintain the status quo of the situation pending trial of the main suit?

(c) Can damages be said to be an adequate remedy?

(d) Is it proper for the court to grant an interlocutory injunction without the plaintiff company providing an undertaking for damages

(e) In the frame of the rights of the parties is the balance of convenience in favour of the plaintiff company?

(f) Can this court candidly say that in exercising discretion to the plaintiff company by way of an injunction it was the only relief necessary so as to do justice to the competing rights of the parties to the suit.

I think on the whole the plaintiff company has not acquitted itself by giving cogent evidence that when I apply the underlying principles I am able to exercise discretion for the ends of justice to be served on this application.

As I have said matters relating to grant of injunction under order 40 (1), (2) and (3)of the civil procedure rules, guided by principles of equity, justice and good conscience together with the above cited authorities as also stated in the case of ***American Cynamid Company v Ethicon Ltd*** are concerned fundamentally to balance the competing rights between the mortgagee and mortgagor with an ultimate view to exercise discretion to do justice to the parties. In the instant application the plaintiff company has not discharged the burden of proof for me to grant the interlocutory injunction sought. The application is therefore lost.

However I appreciate from the evidence that the plaintiff company seems to be experiencing financial difficulties in settling the debt and there may be issues they rightfully wish to bring to the attention of the court at the main trial. In the event I am found to have been wrong in dismissing this application in the circumstances of this case I grant the following alternative prayers:

1. **That the applicants do deposit the disputed loan amount Ksh. 10,000,000 with the court or in a joint earning interest**

account of both advocates within 30 days from today's date.

2. As a consequence to the above order the scheduled sale be stayed and the plaintiff company to pay the auctioneers fees, the costs of the notices and any other ancillary cost incurred by the defendant in the process of redeeming the property.

3. In the event the plaintiff company complies with prayer no.2 the scheduled sale for today stands suspended bringing into effect prayer no. 1 of this order.

4. Costs of this application be borne by the applicant.

Dated, signed and delivered in open court at Kajiado this 18th day of December, 2018.

…….

R.NYAKUNDI

JUDGE

In the presence of:

Mr. Masaviru for the applicant

Mr. Gatheru for the defendant bank