REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 548 OF 2014

WITEROSE RADIO ALARMS (K) LIMITED……..……..PLAINTIFF

AND

GUARDIAN BANK LIMITED..…….....DEFENDANT

RULING

1. The plaintiff, **WITEROSE RADIO ALARMS (K) LIMITED,** has asked the court to grant an interlocutory injunction to restrain the defendant, **GUARDIAN BANK LIMITED,** from advertising for sale, selling, completing any contract for sale, entering into, accessing, alienating, transferring, interfering with or in any manner whatsoever altering or dealing with its property, **L.R. No. KISUMU/KORU/1493.**

2. It is common ground that the said suit property belongs to the plaintiff, as it is the duly registered proprietor.

3. The plaintiff acknowledged that it charged the suit property to the defendant to secure a loan and overdraft facilities which the defendant had advanced to **EXCEL LOGISTICS LIMITED.** The instrument through which the plaintiff charged the suit property to the defendant is dated 21st March 2011.

4. Through that instrument, the plaintiff secured loan and overdraft facilities for an aggregate sum not exceeding Kshs. 7,000,000/-.

5. However, the plaintiff now asserts that the Charge is invalid null and void, for want of consent from the Land Control Board.

6. The plaintiff further asserted that the 42 days' Statutory Notice which the defendant issued on 13th October 2014 was a nullity, as it flouted the provisions of Sections 90 (1) (2) and (3) of Land Act.

7. It is the plaintiff's case that the defendant had failed to issue a Notice pursuant to Section 96 (2) of the Land Act.

8. Thirdly, the defendant is said to have failed to serve Notices upon all the persons as required under Section 96 (3) of the Land Act.

9. The fourth issue raised by the plaintiff was that the defendant had failed to carry out a Valuation of the suit property prior to taking steps to sell it.

10. In the circumstances, the plaintiff contends that if the defendant was permitted to sell the suit property, the plaintiff would suffer irreparable loss and damage.

11. The plaintiff pointed out that the suit property was unique in its character and was set in a peculiar location. Therefore, if it were to be sold off by the defendant, it would be impossible for anyone to either replace it or to compensate the plaintiff by way of damages.

12. By an Amended Plaint dated 4th December 2014, the plaintiff asserted that the Consent letter dated 9th September 2010, by the Muhoroni Land Control Board, was a nullity.

13. It was the plaintiff's case that no application was made to the Land Control Board for the issuance of consent, and that the defendant never paid any fee as is required.

14. It is noteable that the plaint was amended after the defendant had filed and served an affidavit in reply to the application. Annexed to the Replying Affidavit was a Letter of Consent dated 9th September 2010.

15. The defendant sought and was given an opportunity to file a supplementary affidavit. However, notwithstanding an extension of time, to enable it file a supplementary affidavit, the defendant failed to do so.

16. In the circumstances, I find and hold that the plaintiff's contention, concerning the absence of Consent from the Land Control Board, was uncontroverted. I so find because the plaintiff provided the court with Minutes of the Muhoroni Land Control Board Meeting of 9th September 2010, which do not contain any mention of the Consent which the Board had given, for the suit property to be charged to the defendant.

17. Pursuant to the provision's of Section 6 (1) of the Land Control Act;

> **"Each of the following transactions that is to say the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act".**

18. Once the Board gives its decision, the same is final, as stipulated by Section 8 (2) of the Land Control Act.

19. Therefore, if indeed the Muhoroni Land Control Board had given its consent for the suit land to be charged to the defendant, that decision would be final and conclusive, and it could not be questioned in any court.

20. But, at the moment, the defendant has failed to raise any challenge to the plaintiff's contentions that;

> **a) There was no application to the Board, in relation to the charging of the suit property as security for the financial facilities which the bank gave to Excel Logistics Limited;**
>
> **b) The defendant did not pay the Land Control Board in relation to the work it could have done in relation to the suit property being approved as security;**
>
> **and (c) the Board did not, in its meeting on 9th September 2010, give consideration to the application for consent to charge the suit property, in favour of the defendant.**

21. In the circumstances, I find that the plaintiff has demonstrated a *prima facie* case with a probability of success. I so find because in the absence of a Consent by the Land Control Board, the charge instrument, which is the foundation upon which the bank would have derived its statutory powers of sale, would be a nullity.

22. As regards the validity of the Statutory Notice dated 7th October 2014, I find that it fell short of the requirements of Section 90 (2) (b) of the Land Act. That statutory provision stipulates that a chargor should be given Not Less Than 3 months, within which to rectify the default.

23. I have made reference to that subsection because the bank was complaining that the borrower had;

> **"…failed or neglected to repay to our clients the amounts advanced (or balance thereof) to them, which advances were made available to the borrowers in terms of the letters of offer".**

24. The bank gave a Notice of 42 days. As that Notice fell short of the 3 months stipulated by Section 90 (2) (b) of the Land Act, I find, on a *prima facie* basis that the said Statutory Notice was invalid.

25. However, I hasten to add that the invalidity of a Notice issued by a chargee should not be the basis for an Interlocutory Injunction which would bar the chargee from exercising its statutory powers of sale, until the suit was heard and determined.

26. In my considered view, when a Notice was found to be invalid, the chargee ought to be allowed to take steps to exercise its statutory powers of sale after issuing a new notice which is compliant with the law.

27. Therefore, if the only point upon which this application were to be determined was on the question of the invalidity of the notice, the court would have crafted an interlocutory injunction that would have enabled the chargee to issue a valid notice, and then proceed to exercise its statutory powers of sale.

28. Meanwhile, the continued failure of the plaintiff to service the loan would not endear the court to grant him the interim injunction. A borrower ought to service his loan or other financial facility. He cannot borrow money, and then fail to make payments, but expect that the court would bar the bank from taking appropriate action to recover what is due to it.

29. On the question of whether or not damages could be an adequate compensation, I find that although the plaintiff deems the property to be of a unique character, and which was set up in a peculiar location, that would not render it incapable of being compensated. I so find because the plaintiff has already had the property valued at Kshs. 20 Million. In the circumstances, it means that that sum of money would be adequate to cover the value of the property.

30. Secondly, it is the plaintiff who made the conscious decision to offer the property as security. Therefore, the plaintiff is deemed to have equated the property to the financial facilities which the property was security for. And there is a certificate duly acknowledging that the plaintiff well knew that if it defaulted, the bank could sell-off the property.

31. In the circumstances, it was not open to the plaintiff to now assert that the very property which it had offered as security was too precious to be sold off by the bank.

32. In the final analysis, the court finds that the only grounds upon which the plaintiff has demonstrated a *prima facie* case with a probability of success are the absence of a Consent from the Land Control Board, and the inadequacy in the Statutory Notice.

33. If the property were to be auctioned or sold by private treaty, on the strength of a charge which could be found to be void, that process would be incapable of reversal.

34. And whereas damages might be deemed capable of compensating the plaintiff, I find that equity demands that the intended sale be put on hold until the suit is determined.

35. In the event, I grant an interlocutory injunction to restrain the defendant from selling the suit property, in the exercise of its statutory powers of sale. This order shall remain in force until the suit is determined.

36. On the issue of costs, I hold the view that each party should bear its own costs. I so find because it is the plaintiff's failure to service the loan facility which prompted the bank to take steps intended to lead to the realization of the security. In the event, I find that the plaintiff cannot be rewarded with costs, whilst it was not paying money which is legitimately owed to the defendant.

37. Accordingly, I order that each party will meet its own costs of the application dated 18th November 2014.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this 28th **day** of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kipng'eno for the Plaintiff

Miss Nderu for Singh Gitau for the Defendant

Collins Odhiambo – Court clerk.