REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 428 OF 2017

MAFUTA PRODUCTS LTD AND ANOTHER…..…..…..1ST PLAINTIFF

MOHAMED ALI MOTHA……..……..….2ND PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD & ANO…….....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS…….....2ND DEFENDANT

RULING

1. The 2nd Plaintiff (hereinafter "the Applicant"), filed this Notice of Motion Application dated 8th July 2016, under the provisions of Order 40 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all the enabling provisions of the law. He is basically seeking for orders that the Defendants (herein "the Respondents") and/or their officers, servants or agents be restrained from Advertising or offering for sale or selling, disposing of, alienating and/or transferring all that property known as **CR 13065 PLOT NO. MN/111/ 463**, (herein the "suit property"), by way of public auction or private treaty and/or otherwise howsoever from interfering with the Applicant's interests in the property, until the hearing and determination of this suit. That the costs of the Application be provided for.

2. The Application is based on the grounds on the face of it and an Affidavit dated 8th July 2016 sworn by Ramadhani Juma Ali, the Managing Director of the Applicant Company. He avers that the 2nd Applicant charged the suit property in favour of the 1st Respondent to secure facilities advanced to the 1st Applicant by the 1st Respondent. That as a result of extensive negotiations between the Parties, the 1st Respondent agreed to cap the outstanding loan account of the 1st Applicant at a sum of Kshs.330,000,000. It was further agreed that, the 2nd Applicant would dispose of the suit property in order to liquidate the outstanding loan amount. Acting on the aforesaid Agreement, the 2nd Applicant secured a purchaser for the suit, and accordingly advised the 1st Respondent of the concluded Agreement for sale. The Purchaser paid the 1st Respondent a sum of Kshs.46,000,000 as part settlement of the amount due. However, the sale aborted due to the inability of the Purchaser to pay the balance. The 1st Respondent then allowed the Applicants to engage other prospective purchasers.

3. That the Applicants are at an advanced stage of negotiations with very serious investors/buyers, and there are real prospects of finalizing the sale/investment transaction. However, in utter and fragrant breach of its duty of care, the 1st Respondent, has on numerous occasions revoked it's acceptance of

various proposals made by the 1st Applicant in an effort to liquidate of the outstanding loan amount. The 1st Respondent has also failed and/or neglected to communicate acceptance of certain mutually agreed proposals despite having undertaken to do so. As a result thereof the Applicants have been greatly prejudiced.

4. The Applicants avers that the 1st Respondent has issued the Applicants with a notice that it intends to sell the suit property by public auction. This action constitutes or amount to a clog on the Applicants equity of redemption and if the intended sale is not stopped, the Applicants will suffer irreparable loss and damage. Therefore it is only fair and just that the 1st Respondent be restrained as prayed, to accord the Applicants an opportunity to redeem it's properties. The Applicants also averred that they have not been served with the requisite statutory notice.

5. The Application was however opposed by the 1st Respondent based on the Replying Affidavit sworn by Ann Mbatha, Manager Corporate Recoveries of the 1st Respondent. She deposed that, on 19th February 2001, the 1st Respondent upon request, offered the 1st Applicant an overdraft of USD.783,000, a Guarantee and Bond Facility of Kshs.14,000, a three (3) year facility of Kshs.20,000,000 and a loan of Kshs.4,722,000. These facilities were secured by:

a) Debenture to secure Kshs.100,000,000.

b) Legal charge over title no. Ngong/Ngong 1960, 2628 and 2629 to secure Kshs.65,000,000 together with interest and costs accruing from the facility.

c) Legal charge over title No. Kilifi North 111/463 to secure Kshs.27,000,000 together with interest and costs accruing from the facility.

d) Legal charge over Loresho/Nairobi 7752/72 to secure kshs.23,800,000 together with interest and costs accruing from the facility.

e) Legal charge over Kisumu Municipality/Block 12/197 to secure Kshs.8,400,000 together with interest and costs accruing from the said facility.

6. The facilities were further secured by Corporate Guarantee for the sum of Kshs.23,800,000. Subsequently, the 1st Applicant defaulted on repayment, due to the failure to operate the facilities in a satisfactory manner and fell into arrears, whereupon the 1st Respondent called in the repayment of the facilities. A notice was also served on the 2nd Applicant as a Chargor, but the 2nd Applicant also failed to repay the arrears or remedy the default. As a result the 1st Respondents right of sale crystallized. The 1st Respondent averred that the Applicants have been issued with the required statutory notices.

7. The 1st Respondent argued that, the Agreement to cap the amount claimed was upon the terms set out in the documents and letters and more specifically was subject to the outstanding sums being paid within the time frame specified. That deposit of Kshs.46,000,000 paid, was in accordance with the terms of the Agreement, and credited to the principal debtors account on 6th February 2015.

8. The 1st Respondent further avered that, the Principal debtor has not been serious in resolving the debt issue. That, the Applicants alleged that there was a proposed mixed development on the suit property in a joint venture, but that was not supported by an evidence, and the request by the 1st Respondent to one Mr. Ali to furnish the 1st Respondent with a Memorandum of understanding in respect to the Joint Venture did not receive response. It was further stated that, as a result of the Provisions of Section 44A of the Banking Act, the debt is capped, and even then is not being serviced. Therefore the delay in recovery, only works to the benefit of the Applicants.

9. Finally the 1st Respondent told the Court that, there are several suits filed in relation to the suit

property, where injunction Applications have been heard, and the suits left dormant. An Application to dismiss them has been filed by the 1st Respondent, and Application herein is thus devoid of merit and should be struck out.

10. I have considered the rival arguments by the Parties herein. I find that the following issues require determination.

i. Whether the Applicant has met the threshold of grant of an order of temporary injunction.

ii. Whether the orders sought for herein should be granted.

11. As regard the first issue, the principles for grant of an injunction were well established, in the case of ***Geila Vs Cassman Brown & Co. Ltd 1973***, where the Court stated that to grant an order for temporary injunction, the following conditions must be established:

i. The Applicant must establish a prima facie case with a high probability of success.

ii. The Applicant must show that if the orders are not granted, then the Applicant will suffer irreparable loss.

iii. If the Court were to decide otherwise, then it should decide on the basis of the balance of convenience.

12. A prima facie case has been defined in the case of ***Mrao Ltd Vs First American Bank of Kenya Ltd Vs 2 Others 2013 I KLR 125***, as follows:

"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the Court, a 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".

13. I shall now consider the 1st issue of prima facie case. It is not in dispute that the 1st Respondent advanced the 1st Applicant various sums of money and the 2nd Applicant offered the suit property as a security. There is no dispute to the fact that, the loan facility and the repayment thereof is based on the terms set out in the letter of offer and the subsequent contract executed by the Parties. The default in repayment of the loan facility is also not in dispute. The Parties have basically agreed to cap the amount payable to Kshs.330,000,000 in line with the provisions of Section 44A of the Banking Act of Kenya, the debt remains unpaid to the extent of the arrears acknowledged by the 1st Applicant. Apparently, there have been several meeting and/or negotiations to resolve this issue of the outstanding debt, without success.

14. Naturally, upon default the chargee's power of sale arises. However, in the exercise thereof the chargee must follow the laid down procedures, and/or substantive law. The Applicants contents that the provisions of Section 90(2) (b) 96(2) and 97 of the Land Act, have not been complied with as the Applicants have not been served with the requisite statutory notices. That once the chargor alleges non-receipt of the Notice, the charge must prove there was compliance with the law. Thus, the onus of proof thereof lies with the Respondent. Reference was made to the case of ***Nyangilo Ochieng & Another Vs Kenya Commercial Bank CA No. 148 of 1995.*** Further reference were made to the case of ***Joseph Sivo Mosiomo Vs Peter Chege & Others, HCCC NO. 265 of 2007*** where the Court observed that, a chargor must be given a fair amount of time/notice that his property is about to be sold to a 3rd Party because of his default. The Applicant argued that, in the instant case, all that the 1st Respondent has done is to annex to the Replying Affidavit documents spanning over 10 years with no demonstration of service of either of the documents upon the Applicant.

15. The other reason advanced by the Applicant is that, the Respondent has not annexed "a Charge" to

his documents to demonstrate the existence of the said Charge in the first place. That the Applicants have indicated that there exist no Charge over the said property and has even vide a notice to produce requested for the same which has not been availed. That a "*facility letter annexed to the Replying Affidavit and marked "A" cannot be equated to a charge document as the law is clear on the requirements of a charge instrument"*. Reference was made to Section 78 and Section 80(3) of the Land Act 2012.

16. Finally, the Applicant avers that the 1st Respondent is selling the property when negotiations between the parties is at an advanced stage, and it has neglected to accept a proposed arrangement to dispose of the property by private treaty between the 2nd Applicant and a potential purchaser, causing a delay in the disposal thereof.

17. In response, the 1st Respondent argued that various notices of default and of intention to exercise statutory right of sale have been served upon the Plaintiff as per the notices annexed to the Replying Affidavit marked "D". On the issue of frustrating the sale by private treaty, the 1st Respondent reiterated that, from the annexure to the Replying Affidavit marked E, it is clear that, the 1st Respondent has given the 1st Plaintiff more than reasonable latitude to sell the suit property by private treaty. As regard the issue of alleged efforts by the 1st Plaintiff to sell but without success due to inability of the prospective buyers to meet their obligation, and deposit Kshs.46,000,000 made to the 1st Respondent, the 1st Respondent argued that, the 1st Applicant's obligation under the letter of offer was to pay both principal sum and interest and the Kshs.46,000,000 went to the 1st Applicant's account. Finally, the 1st Respondent, denied acting in bad faith by failing to timely accept the Applicant's proposal of selling the property. The 1st Respondent stated that since 2011, the Applicants have not been able to sell the suit property by Private Treaty or secure settlement of the decree. Even the alleged serious investor is not disclosed.

18. The Respondent further submitted that, the Affidavit in support of the Motion is thin in detail and makes general statements which cannot meet the threshold for the orders sought. That, although the Plaintiffs concede at Prayer (A) of the Plaint, to having been served with the notification of sale on 6th June 2016, they did not come to Court until 8th July 2016, therefore the unexplained delay, disentitles the Plaintiffs to any equitable order, as *"Equity does not assist the indolent"*.

19. I have considered the issues raised herein and I find that as regard the issue of Statutory notices, the documents annexed to the Replying Affidavit (see paragraph 12 of the Affidavit) are correspondence from the law firm of Oraro & Co. Advocates, written to the 1st Applicant on various dates. The last notice written was written on 9th January 2014, demanding **Kshs.803,815,194** from the 1st Applicant as the balance outstanding as at 22nd February 2012. It is stated to be a Notice to the borrower to pay the said sum within **30 days** after service of the said notice. The notice is a stamped *"ACKNOWLEDGEMENT COPY"*. It is copied to the 2nd Applicant the Guarantor. The further letters dated 11th July 2006 and 1st August 2006 as indicated to be demand letters. On 23rd July 2014, the 2nd Applicant was served with a Notice of 90 days to pay the outstanding sum of kshs.803,815,194. I have noticed that Notice is not signed, and there is no evidence of service upon the Applicants. I have also noted that some of the correspondences show that, they were sent by registered post (see letter dated 1st August 2006). The question is this; Are the notices of 9th January 2014 and 24th July 2014 valid. It is for the chargee to demonstrate that, the notices were served.

20. I have already indicated that a copy of the Statutory Notice to the 2nd Applicant annexed to the Replying Affidavit sworn by Ann is **"not signed"** at all. Again, in the absence of proof of service of the same, then the Applicant has an arguable point. The only Notice I see acknowledged by the Applicants is the Notification of sale by the Auctioneer (see annexure "RJA2").

21. I also realize under paragraph 11 of the Plaint, the Plaintiffs plead as follows:

"That the 1st Defendant has not issued any statutory Notice of sale to the 2nd Plaintiff as

required by the Land Act 2012……"

The 1st Defendant is well aware that service of the Statutory Notice is disputed.

22. The other issue is that, the 1st Respondent has deposed at paragraph 20 of the Replying Affidavit sworn by Ann that:

> ***"That the outstanding debt is not being served and by reason of the provisions of Section 44A of the Banking Act, the amount of money the 1st Defendant is entitled to recover is capped….."***

23. I also note that under paragraph 13 of the 1st Respondents submissions at page 5, they state that:

> ***"The Plaintiff have further hinged their application on the ground that they have made arrangements to repay outstanding amounts due to the 1st Defendant at an agreed sum of Kshs.330,000,000".***

However, the Statutory Notice and letters of demand sent to the Applicants by the 1st Respondent require them to pay a sum of **Kshs.803,815,194**. Therefore the issue of how much is payable is an arguable issue.

24. The other grounds relied on by the Applicant is that the 1st Respondent has refused to accord the Applicants an opportunity and indulgence for them to sell the property by Private Treaty. That argument does not hold water. The 1st Applicant is in default, and the 2nd Applicant is liable under the Guarantee. The Applicants cannot therefore force the 1st Respondent to accept their mode of realization of the security. It is also clear that they have been given adequate indulgence without any fruits. In the same vein, they cannot accuse the 1st Respondent of acting in bad faith when they are in default and 1st Respondent is merely exercising its statutory right of sale.

25. My finding thereof is that, the 1st Respondent has failed to demonstrate proof of service of the statutory notice upon the Applicants. As stated in the case of ***Joseph Siro Mosionzo (Supra),*** it's important to notify the chargor that the security is due for realization, and at the same time give the chargor an opportunity to repay the debt and exercise it's right of redemption. For that reason the intended right of sale may not be properly exercised.

26. However, it is also established that the principal borrower is in default. The loan is not being serviced. The order sought for herein is an equitable remedy. I concur with the 1st Respondents submissions that "*He who goes to Equity must go with clean hands"*. The Applicants hands and by extension, the 2nd Applicant as a guarantor are tainted by the default to repay the loan. In addition, an order of interlocutory injunction is a discretionary equitable remedy (see ***David Ngugi Mbuthia Vs Kenya Commercial Bank Ltd & Another HCCC NO. 304 OF 2001;)*** and will not be granted where it is shown that the Applicants conduct with respect to matters pertinent to the suit does not meet the approval of a Court of Equity. As per the correspondence exchanged between the Parties, annexed to the Replying Affidavit and marked as "E" the 1st Applicant has had real long time to settle the debt in vain. It would be against the principles of Equity to disregard that fact, and arm Applicants with an injunction to estop the 1st Respondent from recovering the money lawfully owed to it. It must not be lost to all that, Banks are mere agents, trading with monies of depositors by lending to the borrowers, when the money is not repaid, the consequences can be catastrophic, and can lead to the collapse of the Country's economy.

27. It is against this background that I make the following orders, that the Notice of Motion Application herein is allowed in terms of prayer 5 on condition that:

> ***i) The Applicant pays the 1st Defendant 50% of the amount agreed on or capped being Kshs.175 million within thirty (30) days of this order.***

ii) In the meantime, the 1st Defendant to serve the proper Statutory Notice, upon the Applicants and if the Applicant will not comply with the said Notice, the 1st Defendant to proceed with the sale of the suit property, and recover any sums of money that will be in default.

iii) In default of observing condition (i) above the prayer 5 granted will stand vacated and the sale may proceed without further reference to Court.

28. The Costs of the Application will be borne by each party.

29. Orders Accordingly.

Dated, signed and delivered on this 22nd day of June 2017 at Nairobi.

G. L. NZIOKA

JUDGE

<u>In open Court in the presence of:</u>

Ms. Chepkonga for Mr. Mutuma for the 1st & 2nd Applicant

Mr. Kavagi for Ms. Kadima for Chacha Odero for the 1st Defendant/Respondent

No Appearance for the 2nd Defendant/Respondent

Teresia – Court Assistant