REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 606 OF 2015

BESTELL COMPUTERS LIMITED....……....……PLAINTIFF

VERSUS

GROFIN AFRICA FUND.....….…....……..1ST DEFENDANT

GROFIN CAPITAL (PROPERTY) LIMITED...….....……2ND DEFENDANT

GROFIN KENYA LIMITED.....3RD DEFENDANT

RULING

[1] Before the Court for determination is the Plaintiff's Notice of Motion dated **3 December 2015**, which was filed pursuant to **Section 3A** of the **Civil Procedure Act, Section 90** of the **Land Act, 2012** and **Order 40 Rules 1** and **2** as well as **Order 51** of the **Civil Procedure Rules, 2010**. Prayers 1 and 2 thereof are spent; accordingly, what remains for consideration is the Prayer 3 that the Court be pleased to issue a temporary injunction restraining the Defendants by themselves, their servants, agents, auctioneers namely, Westminster Commercial Auctioneers or any other auctioneer from advertising for sale, offering for sale, selling, disposing off or in any other way whatsoever alienating the suit property, **Title No. Eldoret Municipality Block 28/374** by public auction or by private treaty and further restraining them from exercising their right to appoint a receiver over the Plaintiff's business under the Debenture dated **13 April 2010** pending the hearing and determination of this suit. It was also prayed that the costs of the application be in the cause.

[2] The application was premised on the affidavit of the Plaintiff's Managing Director, **Benson Ochieng**, and on the grounds, inter alia, that:

[a] The Plaintiff is the registered absolute proprietor of all that piece of land, **Title No. Eldoret Municipality/Block 28/374** (the Suit Property); and that on or about **2010**, the Plaintiff was in need of working capital and so it approached the Defendants for a facility of **Kshs. 20 million** which it used to pay its suppliers. As collateral the Plaintiff executed a Debenture dated **13 April 2010** against its assets.

[b] That the Defendants further secured **Kshs. 2,500,000** by a Charge Instrument dated **14 April 2010** which was registered against the title to the Suit Property on **7 May 2010**; but that no such additional facility or consideration was advanced.

[c] That the Plaintiff has been servicing the facility in a timely fashion and has so far paid monies in excess of **Kshs. 28 million**; and that on **1 November 2012**, it was served with a Notice by Westminster Commercial Auctioneers dated **25 September 2015,** giving 45 days' Redemption Notice; and that while it was in the process of negotiating for a solution to the Auctioneer's Notice, the Plaintiff's Managing Director came to learn that Suit Property had been advertised for sale on **23 November 2015** in the Daily Nation newspaper for public auction on **11 December 2015**.

[d] That the Auctioneers Notice dated **15 September 2015** as well as the advertisement to sell the Suit Property are illegal and null and void for being a premature direct clog on the Plaintiff's equity of redemption.

[3] On account of the foregoing, the Plaintiff invoked the Court's power under **Section 103** and **104** of the **Land Act**, for the issuance of a temporary injunction to restrain the intended auction pending the hearing and determination of the suit on its merits, as the Plaintiff stands to suffer irreparable loss and damage if the orders sought are not granted. These grounds were explicated in the Supporting Affidavit sworn on **3 December 2015** to which the Plaintiff annexed copies of the Title document, the Debenture and Charge (marked **Annexures BO1, BO2** and **BO3**, respectively). Also annexed to the Supporting Affidavit were copies of the Auctioneer's 45 days' Redemption Notice and the sale advertisement; and on the basis of the foregoing, the Plaintiff urged the Court to issue a temporary injunction pending the hearing of the main suit.

[4] The application was opposed by the Defendants. An affidavit in Reply, sworn on **11 March 2016** by the 3rd Defendant's General Manager, **Rishi Richie Khubchandani**, was filed herein to confirm that indeed, vide a loan agreement dated **30 March 2010**, the Plaintiff obtained from the 1st and 2nd Defendants a loan facility of **Kshs. 20,000,000/=** as working capital toward its business operations; and that as part of the security for the said loan, the Plaintiff charged the Suit Property as a first legal Charge for an amount of **Kshs. 2,500,000** in favour of the Defendants and a Charge dated **14 April 2010** was created against the charged property.

[5] It was further averred by **Mr**. **Khubchandani**, that a fixed and floating charge was created in favour of the Defendants over all the existing and future movable assets of the Plaintiff for an amount of **Kshs. 20,000,000** by way of a Debenture dated **13 April 2010** and registered on **16 April 2010** together with an Addendum dated **28 November 2012** for an additional loan facility of **Kshs. 10,000,000**; and a Further Charge dated **6 December 2012**. It was the contention of the Defendants that when the Plaintiff defaulted in discharging its obligation to pay the monthly instalments in accordance with the agreement between the parties, statutory notices were issued to it in compliance with the law. Copies of the said notices were attached to the Replying Affidavit as exhibits to demonstrate that the Plaintiff was served with and did receive the following notices:

[a] Demand Notice under **Section 90** of the **Land Act.**

[b] Notice to Sell under **Section 96** of the **Land Act** (**Annexure RRK 10)**

[c] Redemption Notice pursuant to **Rule 15(d)** of the **Auctioneers Rules, 1997.**

[d] Advertisement of the auction as carried in the Daily Nation newspaper of **7 December 2015**.

[6] It was further the contention of the Defendants that the Plaintiff has persisted in its default todate and has failed to honour the mutually agreed terms of their agreement; and therefore its Notice of Motion ought to be dismissed with costs as no prima facie case has been made out by the Plaintiff. The averments were reinforced by the Plaintiff's Supplementary Affidavit filed on **30 June 2016** as well as the Defendant's Further Replying Affidavit filed on **7 September 2016.**

[7] The application was canvassed by way of written submissions, which I have carefully perused and considered. **Order 40 Rules 1** of the **Civil Procedure Rules**; which is the key enabling provision herein provides that:

Where in any suit it is proved by affidavit or otherwise--

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongly sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation,sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[8] The foregoing being a discretionary provision, the case of **Giella Vs Cassman Brown and Company Limited [1973] E.A 358**, and the principles enunciated thereby are instructive in determining whether the Plaintiff has made out a good case to warrant the exercise of that discretion. Firstly that the Plaintiff must show that it has a *prima facie* case with a probability of success; secondly that it stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and, if the Court is in doubt, it will give consideration to the balance of convenience.

[9] The question as to what amounts to a *prima facie* case was answered by the Court of Appeal in the case of **Mrao –vs- First American Bank (K) Ltd** thus:

"…So what is a prima facie case? I would say that in civil cases it is a case in 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...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 success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case." (Per Bosire JA)

[10] From the averments in the affidavits and the annexures thereto, there appears to be no disputation that the Defendants entered into a facility agreement with the Plaintiff for the sum of **Kshs. 20,000,000/=,** or that the loan was secured by a first legal charge over the Suit Property as well as a Debenture over the Plaintiff's assets. Although the Defendants contended that there was a further facility of **Kshs. 10,000,000,** this was denied by the Plaintiff, whose contention at paragraph of the Supplementary Affidavit was that, in respect of the additional facility of **Kshs. 10,000,000/=,** the addendum was not duly executed and is therefore not binding on it. In particular, the Plaintiff raised the following points, in a bid to demonstrate that it has a prima facie case:

[a] That the debt has been fully repaid

[b] Failure by the Defendants to serve notices under **Section 90(1)** of the **Land Act;**

[c] Failure by the Defendants to serve a notice compliant with **Section 90(2)(b)** of the **Land Act**;

[d] Failure by the Defendants to make a formal demand for payment to the Plaintiff;

[e] Depriving the Plaintiff of the notice period to remedy the default under **Section 90(3)** of the **Land Act;**

[f] Failure to value the suit property in the last one year prior to sale;

[g] Advertising the property for sale before the expiry of the 45 days' notice from the date of service of the notice on **1 November 2015;**

[h] Failing to effect personal service of the statutory notices;

[i] Contravening the Auctioneers Act and Rules thereunder;

[j] Charging exorbitant unconscionable rates of interest and penalty to allegedly demand repayment of **Kshs. 11,363,394** out of a facility of **Kshs. 2,500,000** whereas the Plaintiff had repaid in excess of **Kshs. 28,000,000** in full and final redemption of the Debenture and the charged Title;

[k] Undervaluing the Suit Property with the intention to fraudulently dispose of it at an under sale to the Plaintiff's detriment;

[l] Failing to accompany the auctioneer's letter with an up to date statement of account as required by **Section 90(2)** of the Land Act explaining the extent of default and charges;

[m] Clogging the Plaintiff's equity of redemption by refusing to provide statements to allow or facilitate refinancing;

[n] Contravening **Section 96** of the **Land Act.**

[11] Accordingly, on the question to determine is whether the Applicant has demonstrated a prima facie case showing that he has a legal right which has been infringed by the 1st Respondent. In making this determination, it is instructive to bear in mind the standard of proof laid down by the Court of Appeal in **Nguruman Limited Vs Jan Bonde Nielson & 2 OthersCourt of Appeal No. 77 of 2012**thus:

"We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities."

[12] Section 90 of the **Land Act** provides as follows:

(1) If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing to pay the money owing or to perform and observe the agreement as the case may be.

(2) The notice required by subsection (1) shall adequately inform the recipient of the following matters--

(a) the nature and extent of the default by the chargor;

(b) if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;

(c) if the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the chargor must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified;

(d) the consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this subpart; and

(e) the right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

(3) If the chargor does not comply within ninety days after the date of service of the notice under subsection (1), the chargee may--

(a) sue the chargor for any money due and owing under the charge;

(b) appoint a receiver for any money due and owing under the charge;

(c) lease the charged land, or if the charge is of a lease, sublease the land;

(d) enter into possession of the charged land; or

(e) sell the charged land.

[13] The annexures to the Replying Affidavit does show that a notice under **Section 90** was duly issued dated **9 February 2015** that is evidently compliant with **Section 90(2)** of the **Land Act** aforestated, including notification that if the outstanding sum was not paid within 3 months the Defendants would proceed with the sale of the property. The Defendants further provided proof that that notice was duly served as per by way of registered post to the Plaintiff's address as indicated in the security instruments and other correspondence exchanged between the parties. In particular, it is noteworthy that the same address was provided by the Plaintiff in the Witness Statement of **Benson Ochieng** dated **3 December 2015** which was filed with the Plaint and the Title to the Suit Property. I would accordingly take the same view that was taken in **Musa & Sons Ltd & Another -Vs- First National Finance Bank & Another [2002]IKLR 581** and in particular on the following excerpt thereof:

"The law is well settled that where the service is by registration the service is deemed to have been done if sent to the last known address of the mortgagor …I must accept that once the mortgagee proves that he served the mortgagor as is required ... the Court must accept that he has discharged the burden on him in respect of service. To accept otherwise would in my mind be playing in the hands of scrupulous debtors who may very well refuse to collect such registered letters on the knowledge or suspicion that such letters constitute important obstacle in their attempt to avoid facing responsibility over the loans they have with their financiers. It would provide the easiest way out and they would in that way avoid being pinned down to account for such loans. I will not lend a hand to such machinations. I do find that service here was proper and that it would have only been found to have been improper if the appellant had offered acceptable reason as to why he could not claim same letter.

[14] The same finding was made by the Court in **Elizabeth Wambui Njuguna -Vs- Housing Finance Co. of Kenya Limited [2006] eKLR** where it was stated thus:

"With regard to the burden which shifted to the Plaintiff to prove that she did not receive the letter, statutory notice, the Court's finding gets support from Section 107(1) of the Evidence Act which provides:-

'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

The Plaintiff ought to have brought evidence to show that the letter sent by Defendant was not received by her and this could have been confirmed by the post master general. The

Court's finding therefore on prima facie basis, on the evidence presented before me at this interlocutory stage, is that that the Plaintiff was served with the statutory notice."

[15] In the same vein, a copy of a notice issued by the Defendants under **Section 96** of the **Land Act** was provided herein and marked **Annexure RRK10** to the Replying Affidavit . That notice is dated **21 May 2015,** and therefore cannot be said to have coincided with the initial Notice to Pay that was issued under **Section 90(1)** of the **Land Act**, dated **9 February 2015**. Again, that notice was served by registered post and proof thereof provided by the Defendants by way of Annexure **RRK 11** to the Replying Affidavit; and it was long after the expiry of the 40 days specified in **Annexure RRK10** that the Redemption Notice was issued by Westminster Commercial Auctioneers per Annexure **RRK13a,** which was also duly served on **1 October 2015** as per the Affidavit marked **RRK13e.** Accordingly, the 45 days lapsed on or about **16 November 2015**. Clearly therefore, it was mischievous for the Plaintiff to contend that the advertisement of **7 December 2015** was carried before the expiry of the 45 days from the date of service.

[16] There is further evidence that the property was duly valued for purposes of the public auction, and that the Valuation Report dated **22 July 2015** which was annexed to the Replying Affidavit as Annexure **RRK 16** was valid and in consonance with **Section 97(2)** of the **Land Act** for the purpose of ascertaining the Forced Sale Value of the property. It was therefore not accurate for the Plaintiff to contend that the Defendants had failed to value the Suit Property in the last one year prior to the scheduled sale.

[17] The Plaintiff also contended that the Defendants charged exorbitant unconscionable rates of interest and penalties; but it is now trite that a dispute on accounts is no basis for the grant of an injunction to restrain a Chargee from exercising its Statutory Power of Sale. (See **Fina Bank Ltd. V Ronak Ltd [2001] 1 EA 54) and as** more succinctly stated in **Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725:**

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagor claims to be due to him, unless, on the terms of the mortgage, the claim is excessive''.

[18] In the light of the foregoing, it is my considered finding that the Applicant has not made out a prima facie case in the sense envisaged by the definition given in **the Mrao Case** aforestated. That being the case, it would be unnecessary to consider the second principle laid down in the Giella Case, namely whether he stands to suffer irreparable loss for which damages may not be adequate recompense. This is because, as was laid down in **the Nguruman Case**:

"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…if prima facie case is not established, then irreparable injury and balance of convenience need no consideration…"

[19] In the result, my considered finding is that the Applicant's application dated **3 December 2015** is lacking in merit and is hereby dismissed with costs. For the avoidance of doubt, the interim injunction issued on **9 December 2015** is hereby vacated.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2017

OLGA SEWE

JUDGE