REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 203 OF 2017

CALEB OMOROH OWOUR.....…PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

KEYSIAN AUCTIONEERS.....2ND DEFENDANT

RULING

[1] The Notice of Motion dated **12 May 2017** was filed herein by the Plaintiff, **Caleb Omoroh Owour**, under **Section 3A** and **63(e)** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya** and **Order 40 Rules 1, 2 and 3** of the **Civil Procedure Rules**, **2010**, for orders that:

[a] Spent

[b] Spent

[c] A temporary injunction be issued to the Defendants, their agents and/or servants and/or employees and/or whomsoever restraining them from selling and/or disposing of and/or alienating and/or in any manner whatsoever the following properties pending the hearing of this suit:

[i] Mombasa/Mainland South/Block 1/1527

[ii] Kisumu/Kasule/5117

[iii] Kisumu/Dago/1202, 1203, 1204, 1205 and 1206

[iv] Mercedez Benz KBU 929U

[v] Lorry KBD 175G

[d] That the costs of this suit be provided for.

[2] The application is premised on the Plaintiff's own affidavit annexed thereto, sworn on **12 May 2017**. He averred therein that in **May 2014**, he approached the 1st Defendant for certain overdraft facilities to

enable it engage in the construction business. His request was granted and he was given a revolving overdraft facility for **Kshs. 4 million,** which was later increased to **Kshs. 6 million**, and a temporary overdraft facility for **Kshs. 2 million**. He further averred that, although both facilities were subject to renewal at the end of each year, the 1st Defendant did not renew the overdraft at the end of the year **2016** because of a delayed payment by the Government of Kenya for the works that had been done by **Toshe Construction & Engineering Limited,** of which he is a Director.

[3] The Plaintiff further averred that upon withdrawal of the facilities, he approached the 1st Defendant with a request that the overdrafts be converted into term loans and was assured, after discussions, that the request had been agreed to in principle pending formal communication; but instead, he was surprised to receive a letter from the 2nd Defendant **(marked "COO2")** demanding payment of **Kshs. 17 million**. To avert the threatened sale of the charged properties, he approached the 1st Defendant with an offer to settle the debt by paying **Kshs. 2 million** at the end of **May 2017;** and once again, the 1st Defendant gave a verbal undertaking to stop the intended auction, but that on **10 May 2017**, the 2nd Defendant called him on the telephone and informed him that they would proceed with the sale anyway, and that the property had accordingly been advertised for sale as they had not received any communication from the Bank to the contrary. The Plaintiff impugned the auction process contending that it was in breach of the applicable provisions of the law as well as the oral agreements made between the parties. Accordingly, he moved the Court seeking for a temporary injunction pending the hearing and determination of this suit.

[4] The Defendants opposed the application vide the Replying Affidavit sworn by the 1st Defendant's Senior legal Officer, **Mr. Anthony Ouma,** wherein it was averred that **Toshe Construction & Engineering Limited** had been accorded credit facilities as follows:

> **[a]** By way of a Letter of Offer dated **22 December 2015**, the Plaintiff took an overdraft facility for the purpose of business working capital, in the cumulative sum of **Kshs. 9,464,000** (marked **Annexure "AO-1");**
>
> **[b]** By way of a Letter of Offer dated **30 March 2016**, the 1st Defendant extended a mortgage facility to the Plaintiff in the sum of **Kshs. 5,000,000/=** for the purpose of purchasing a house. (per **Annexure "AO-2);**

[5] It was further averred by the 1st Defendant that based on the two facilities, the sums advanced to the Plaintiff were secured as follows:

> **[a]** Joint registration of motor vehicles registration numbers **KBU 929U** and **KBD 175G** in the names of the Bank and the Plaintiff (Log Books marked **Annexure AO-3(a) and (b)** respectively);
>
> **[b]** A first ranking Legal Charge for **Kshs. 4,000,000/=** over **LR No. Mombasa Mainland South/Block 1/527;**
>
> **[c]** A first ranking Legal Charge for **Kshs. 1,500,000/=** over **Title No. Kisumu/Kasule/5117** (Copy of Charge marked **Annexure AO-4);**
>
> **[d]** A first ranking Legal charge for **Kshs. 5,000,000/=** over **Title No. Kisumu/Municipality Block 14/13;**
>
> **[e]** A first ranking Charge for **Kshs. 1,500,000/=** over **Title No. Kisumu/Dago/1202, 1203, 1204, 1205 and 1206** (copies of Charge marked **Annexure AO-5(a) to (e).**

[6] It was the contention of the 1st Defendant that the Plaintiff, having received the monies under the Charge documents herein, defaulted in the settlement of instalments as agreed, leading to an accrued outstanding balance of **Kshs. 18,435,890.58** as at **25 May 2017**; which sums continue to accrue interest

until full payment. Consequently, the 1st Defendant notified the Plaintiff on several occasions to regularize the account but the requests were not heeded; which is why the 1st Defendant issued a Statutory Notice to the Plaintiff, dated **28 December 2016** (per **Annexure AO-6(a)** and **(b)** to the Replying Affidavit). Thus, the 1st Defendant averred that it only instructed the 2nd Defendant after the Plaintiff failed to respond to the Statutory Notice; whereupon, the 2nd Defendant proceeded to issue the requisite Redemption Notice as required by law, and upon expiry of the notice period, the Auctioneer was in order to advertise the properties for sale as was done.

[7] It was therefore the case of the 1st Defendant that, having issued the Plaintiff with an opportunity to settle the outstanding amounts and having issued the requisite notices, the Plaintiff had only himself to blame for the situation in which he has found himself; and has therefore not met the threshold for the grant of the equitable remedy sought. Further, the 1st Defendant accused the Plaintiff of material non-disclosure in failing to disclose that he had been served with the requisite statutory notices. Thus, the Defendants prayed for the dismissal of the Plaintiff's application dated **12 May 2017** with costs.

[8] The application was disposed of by way of written submissions which were filed pursuant to the directions issued herein on **26 May 2017**. The Plaintiff's written submissions were filed on **22 June 2017** in which Counsel for the Plaintiff conceded that the 1st Defendant did grant a revolving overdraft facility to the Plaintiff's company, **Toshe Construction and Engineering Ltd;** which loan was secured by a Charge over the Suit Properties, which belonged personally to the Plaintiff. Counsel reiterated the Plaintiff's contention that the Company serviced the facility until **2016** when it experienced delays in remitting the repayments due to the failure by the Government of Kenya to pay the Plaintiff Company for work done; and that in **February 2017**, the Plaintiff approached the 1st Defendant with a request to convert the overdraft into a term loan which was agreed to in principle pending a formal agreement. That in total breach of that agreement, the 1st Defendant instructed the 2nd Defendant to demand a total sum of **Kshs. 17 million**, being the initial loan and the interest. Counsel submitted that there is a disparity between the interest charged on the facility and the contractual interest which was agreed at **11.13%** plus **6%**; and that on this basis alone the Plaintiff is entitled to the prayers sought pending the hearing and determination of the suit.

[9] The Defendants, in their written submissions filed herein on **17 July 2017,** argued that the requirements for the grant of a temporary injunction as laid down in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 538** had not been met by the Plaintiff in that the Plaintiff had not demonstrated a *prima facie* case, because it is not in contention that the Plaintiff's company obtained an overdraft facility from the 1st Defendant and thereafter defaulted in the settlement of the agreed instalments. It was further submitted by the Defendants that all the requisite notices were duly served, and that the Plaintiff chose to wait until the last day on **8 May 2017** to write to the 1st Defendant seeking the stoppage of the sale; and therefore, according to the Defendants, there was no meeting of the minds on the Plaintiff's request for the cancellation of the auction.

[10] In support of their written submissions, Counsel for the Defendants relied on the following authorities:

> **[a] Mrao Ltd vs First American Bank of Kenya ltd & 2 Others [2003] KLR 125** for the proposition that an applicant for interlocutory injunction must show an infringement of a right, and the probability of success at the trial;
>
> **[b] Francis J.K. Ichatha vs Housing Finance Co. of Kenya Ltd** in support of their argument that no court of equity would protect a man from the consequences of his own default;
>
> **[c] Daniel Kamau Mugambi vs. Housing Finance Company of Kenya Ltd [2006] eKLR** for their submission that it is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges; and

[d] **Joseph Marenge Osawa vs. Agricultural Finance Corporation [2014] eKLR** for saying that a party whose hands are tainted with deceit is not deserving of an equitable remedy of injunction.

[11] On whether the Plaintiff has satisfied the second condition in the **Giella Case**, it was the submission of the Defendants that having failed to establish a prima facie case, it cannot be said that the Plaintiff stands to suffer irreparable harm; and that the Plaintiff had not set out clearly the kind of irreparable injury it would suffer for which damages would be inadequate in the face of the admission that the loan was not serviced in accordance with the agreement of the parties. The cases of **Henry Wanyama Khaemba vs. Standard Chartered Bank Ltd & 3 Others [2005] eKLR** and **Moses Ngenye Kahindo vs. Agricultural Finance Corporation HCCC No. 1044 of 2001** were relied on in support of the argument. Counsel added that, the Plaintiff having failed to satisfy the first two conditions in the **Giella Case**, the question of a consideration on the balance of convenience would not arise; and that in any event, it was argued, a person who causes his property to be charged to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. The Court was thus urged to find that the Plaintiff is not deserving of the orders sought as he has neither demonstrated the existence of a prima facie case nor shown that he stands to suffer irreparable loss that cannot be compensated by an award in damages; and to accordingly dismiss the Notice of Motion dated **12 May 2017** with costs.

[12] The Plaintiff's application was filed pursuant to **Section 3A** and **63(e)** of the **Civil Procedure Act** as well as **Order 40 Rules 1, 2** and **3** of the **Civil Procedure Rules**, which generally provide for situations in which temporary injunction may be granted. Where, as in this case, it is alleged that the property that is the subject matter of this suit is in danger of being disposed of, **Order 40 Rule 1(a)** of the **Civil Procedure Rules** provides thus:

> **"Where in any suit it is proved by affidavit or otherwise 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 ...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."**

[13] There appears to be no dispute that the Plaintiff is the registered proprietor of the suit properties, or that he charged them to the 1st Defendant to secure a borrowing by **Toshe Construction & Engineering Ltd.** It is also not in dispute that the Plaintiff defaulted in servicing the said facility, for which reason the 1st Defendant instructed the 2nd Defendant to proceed and sell the suit properties by public auction upon issuing the requisite notices. The notices annexed to the Supporting Affidavit dated **17 February 2017** and **20 February 2017** as well as the advertisement dated **8 May 2017** confirm that the Defendants were intent on disposing of the property on **16 May 2017**. Accordingly, the Plaintiff was within his rights to approach the Court as it did for interim relief pending an inquiry by the Court into his grievance. Thus, on **16 May 2017,** the Court (**Onguto, J.)** granted him interim orders of injunction as per Prayer 2 of the Notice of Motion dated **12 May 2017** pending the hearing and determination of this application. For the remainder of the application to be granted as per Prayer (3) thereof, the Court has to satisfy itself that the three requirements set out in the case of **Giella vs. Cassman Brown& Co. Ltd** (supra) have been met, namely:

[a] A *prima facie* case with probability of success

[b] Irreparable damage which cannot be compensated by an award of damages; and

[c] That the balance of convenience is in favour of the Plaintiff.

[14] In Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 the Court of Appeal had occasion to give consideration to what a *prima facie* case is, and expressed the view that:

> **"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. 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."

[15] It is the contention of the Plaintiff that in **May 2014**, his company, **Toshe Construction & Engineering Ltd**, was granted a revolving overdraft facility for **Kshs. 4 million,** which was later increased to **Kshs. 6 million**, together with a temporary overdraft facility for **Kshs. 2 million**. He further averred that, although both facilities were subject to renewal at the end of each year, the 1st Defendant did not renew the overdraft at the end of **2016** because of a delayed payment for the works that had been done by his company aforementioned. He then approached the 1st Defendant with a request that the overdrafts be converted into term loans and was assured, after discussions, that the request had been agreed to in principle pending formal communication, but instead, he was surprised to receive a letter from the 2nd Defendant **(marked "COO2")** demanding payment of **Kshs. 17 million**. To avert the threatened sale of the charged properties, he wrote to the 1st Defendant with an offer to settle the debt by paying **Kshs. 2 million** at the end of **May 2017;** and once again, the 1st Defendant gave a verbal undertaking to stop the intended auction, but that on **10 May 2017**, the 2nd Defendant called him on the telephone and informed him that they would proceed with the sale, and had accordingly advertised the property as they had not received any communication from the Bank to the contrary.

[16] The Defendants refuted the Plaintiff's allegations contending that it was the Plaintiff's own default that triggered the intended sale; and that as at **25 May 2017,** the outstanding balance due on the account was **Kshs. 18,435,890.58**; which sums continue to accrue interest. It was further the contention of the 1st Defendant notified the Plaintiff on several occasions to regularize the account but the requests were not heeded; and therefore that it was within its rights to issue the Statutory Notice dated **28 December 2016** (per **Annexure AO-6(a)** and **(b)** to the Replying Affidavit). Thus, the 1st Defendant averred that it only instructed the 2nd Defendant after the Plaintiff failed to respond to the Statutory Notice; whereupon, the 2nd Defendant proceeded to issue the requisite Redemption Notice as required by law, and upon expiry of the notice period, the Auctioneer proceeded to advertise the properties for sale.

[17] A perusal of the letter dated **28 December 2016** does show that the Plaintiff had been given an earlier statutory notice dated **22 September 2016**. However, the same having not been availed for the Court's perusal, I would take it that **Annexure AO6(a)** is the Statutory Notice issued by the 1st Defendant under **Section 90** of the **Land Act** as is purported therein. It is instructive that **Section 90** of the **Land Act**, **2012** provides that:

"(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 section (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 section in accordance with the procedures provided for in this sub-part; and

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

[18] The notice dated **28 December 2016**, marked **Annexure AO-6(a)** to the Replying Affidavit reads as follows in part:

"...TAKE FINAL NOTICE therefore pursuant to sec 90 of the Land Act that we shall exercise our power of Sale over the charged property namely TITLE NO. MOMBASA/M.S/BLOCK 1/1527, KISUMU/KASULE/5117, KISUMU/DAGO/1202, 1203, 1204, 1205 & 1206 within 40 days of the service of this notice without further notice to you so as to recover the amount owed to us and secured by the said charge together with all interest accrued thereon and costs charges and expenses, unless the arrears amount owed to us is paid in full before then."

[19] It is manifest therefore that the said notice is indeed deficient for purposes of **Section 90** of the **Land Act** for the reason that it purported to provide the Plaintiff with only 40 days; and whereas a valid Notice **under Section 96** of the **Land Act**, may have been issued by the 1st Defendant in the form of the Notification of Sale dated **17 February, 2017**, the Plaintiff is justified in complaining that the Redemption Notice contemplated under **Rule 15** of the **Auctioneers Rules**, which is what **Annexure AO-8** purports to be, was not issued 40 days after the **Section 96 Notice**. That notice was issued on **20 February 2017**, only 3 days after the **Section 96 Notice**. Moreover, by the advertisement dated **8 May 2017**, the Defendants provided for only days notice before the sale that was scheduled for **16 May 2017,** yet **Rule 15(e)** of the **Auctioneers Rules** provides that:

"On expiry of the period of notice without payment arrange sale of the property not earlier that fourteen days after the first newspaper advertisement."

[20] The Plaintiff has accordingly shown an apparent material irregularity that would affect the validity of the intended sale**. Indeed in Nationwide Finance Co. Ltd Vs Meck Industries Ltd & Michael Gerald Kimani [2001] eKLR**, **Visram, J.** (as he then was) was of a similar view, when he held that:

"The failure to comply with the relevant mandatory requirement of the Auctioneers Rules was a material irregularity."

In the premises, I am satisfied that the Plaintiff has indeed demonstrated that he has a right **which has apparently been infringed by the Defendants"...as to call for an explanation or rebuttal from the latter..." and therefore it is immaterial that the Plaintiff was in breach or that he did not disclose that he had been served with a valid statutory notice.**

[21] As to whether the Plaintiff stands to suffer irreparable loss, it is now well settled that where there is breach of the law, an applicant cannot be compelled to accept damages as recompense. In Kanorero River Farm Ltd and 3 others –vs- National Bank of Kenya Ltd (2002) 2 KLR 207 for instance, **Ringera, J.** (as he then was) held at page 216:-

"I would for those reasons alone accede to the Plaintiff's prayer for interlocutory injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank could compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages."

[22] Similarly **Warsame, J**. in the case of **Joseph Siro Mosioma V Housing Finance Company of**

Kenya Limited & 3 Others [2008] eKLR held as follows:-

> ***"On my part let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substitute for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."***

[23] *As to whether the balance of convenience is in favour of the Plaintiff, it is now settled that* the Court should always opt for the lower rather than the higher risk of injustice. This was held to be so in the case of **Suleiman –vs- Amboseli Resort Ltd (2004) 2 KLR 589** in which **Ojwang Ag. J** (as he then was) quoted Justice Hoffman in the English case of **Films RoverInternational (1986) 3 All ER 772** in which the said judge made this point regarding the grant of injunctive relief:

> **" A fundamental principle of …that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' …"**

[24] In the instant matter, the path leading to the lower risk of injustice would be to stop the impugned auction pending the hearing and determination of the Plaintiff's case. Accordingly, I find merit in the Plaintiff's application and would grant orders in his favour in the following terms:

> **[a] A temporary injunction be and is hereby issued to the Defendants, their agents and/or servants and/or employees and/or whomsoever restraining them from selling and/or disposing of and/or alienating and/or in any manner whatsoever the following properties pending the hearing of this suit:**
>
> > **[i] Mombasa/Mainland South/Block 1/1527**
> >
> > **[ii] Kisumu/Kasule/5117**
> >
> > **[iii] Kisumu/Dago/1202, 1203, 1204, 1205 and 1206**
> >
> > **[iv] Mercedez Benz KBU 929U**
> >
> > **[v] Lorry KBD 175G**
>
> **[b] That the costs of the application be in the cause**.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF OCTOBER, 2017

OLGA SEWE

JUDGE