



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 501 OF 2016

ABUDALLAHI MOHAMMED SHEIKH.....PLAINTIFF

VERSUS

GULF AFRICAN BANK LIMITED.....DEFENDANT

RULING

[1] The Notice of Motion dated **19 December 2016** was filed herein on even date by the Plaintiff/Applicant, **Abdullahi Mohammed Sheikh**, pursuant to **Section 104** of the **Land Act, 2012**, **Section 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 40 Rules 1, 2 and 4**, and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] spent

[b] Spent

[c] The Court be pleased to grant a temporary injunction restraining the Defendant/Respondent by itself, through its agents, employees and/or servants, assigns or any other person whatsoever acting on its behalf and/or under its mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner whatsoever interfering with the properties known as **Land Reference Numbers 209/260/19388, 209/7260/19389** and **209/7260/72** pending the hearing of this suit.

[d] In the alternative, that the time for compliance and/or rectifying any default to redeem **Land Reference Numbers 209/260/19388, 209/7260/19389** and **209/7260/72** be extended to a period that the Court may so determine.

[e] Further in the alternative to the above, that the Defendant/Respondent's statutory power of sale be suspended and/or postponed for a period that the Court may so determine to enable the Plaintiff/Applicant to redeem **Land Reference Numbers 209/260/19388, 209/7260/19389** and **209/7260/72**.

[f] That the costs of the application be provided for.

[2] The grounds upon which the application was predicated are that the Plaintiff is the registered owner of the plots known as **Land Reference Numbers 209/260/19388, 209/7260/19389** and **209/7260/72**, (the

"Suit Property"); and that the Defendant, through a Letter of Offer dated **3 December 2015**, agreed to extend Diminishing Musharakah Sale and Lease Back finance facilities to the Plaintiff, on the basis of a Charge on the properties **LR No. 209/260/19388** and **209/7260/19389** up to a maximum principal amount of **Kshs. 80,000,000/=**. It was averred by the Plaintiff that their relationship with the Defendant, according to the principles governing the Diminishing Musharakah Sale and Lease Bank facility, should operate as a partnership between the borrower and the lender; and that the Defendant's share was divided into smaller units which the Plaintiff was to buy periodically.

[3] It was thus the contention of the Plaintiff that interest would not accrue on the transaction, yet the Defendant had purported to demand the payment of **Kshs. 96,539,145.95** which included interest on the principal sum as well as default charges, contrary to the agreement between the parties. These grounds were explicated in the Supporting Affidavit sworn by the Plaintiff on **19 December 2016** and the annexures thereto, wherein it was also averred that the Plaintiff has so far paid **Kshs. 20,000,000/=** which did not appear to account for much in the Defendant's accounting.

[4] The Defendant opposed the application, and in the Replying and Supplementary Affidavits sworn on its behalf by its Legal Officer, **Mr. Lawi Sato**, it was averred that the Plaintiff was advanced various facilities by the Defendant as set out in paragraph 3 of the Replying Affidavit; and that as security for the various facilities, the Plaintiff executed the following documents:

[a] Legal Charge dated **4 October 2010** over **LR No. 209/7260/72** for **Kshs. 30 million**, a copy whereof was exhibited at pages 18-40 of the Replying Affidavit;

[b] Further Charge dated **4 July 2011** over **LR No. 209/7260/72** for **Kshs. 30 million** (copy at pages 41 to 58 of the annexures to the Replying Affidavit);

[c] Charge dated **10 August 2016** over **LR Nos. 209/7260/19388** and **19389** for **Kshs. 80 million** (see pages 50 to 91 of the Replying Affidavit).

[5] It was thus the averment of the Defendant that following default by the Plaintiff, its Advocates served the requisite statutory demand notices, whereupon the Plaintiff made several admissions of his indebtedness to the Defendant; and that by the said admissions, the Plaintiff confirmed that he was in breach of his contractual obligations. Thus, the Defendant averred that, contrary to the allegations raised in paragraphs 5 to 8 whereby the Defendant is accused of breach of contract, at no time did the Defendant go outside the stipulations of the contracts and the *shariah* financing law. It was further deposed that, apart from the Plaintiff's failure to disclose pertinent aspects of the matter to the Court, he was hopelessly in default, and therefore not entitled to the equitable relief of injunction.

[6] In the written submissions filed by Counsel for the Plaintiff, the concept of Diminishing Musharakah was explained at length, to demonstrate that the Defendant was out of line in loading interest to the Plaintiff's account, as it purported to do through the letter dated **2 November 2016**. The case of **David Ngugi Ngaari vs. Kenya Commercial Bank Limited [2015] eKLR** was relied on to augment the Plaintiff's argument that an injunctive order would be apposite herein where there is breach of contract and fraud; and on the authority of **Mohamud Sheikh Hussein vs. Gulf African Bank Limited [2013] eKLR**, Counsel for the Plaintiff urged the Court to bear in mind that the sale of a person's property is not a matter that should be taken casually, given that the effect would be to tamper with the constitutional right to property as enshrined by **Article 40** of the Constitution. Thus, it was submitted by the Plaintiff, that a good case has been made out and that the threshold of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**, for the grant of the interlocutory relief of injunction, has been met herein; and therefore that the Plaintiff is entitled to the orders sought.

[7] Counsel for the Defendant, on the other hand, was of the conviction that the Plaintiff has not satisfied the principles espoused in the case of **Giella vs. Cassman Brown** (supra); and that this is a case where the Plaintiff, as a debtor, has admitted being in default and yet seeks to have the Defendant restrained from exercising its statutory power of sale. Counsel relied on the case of **Kyangaro vs. Kenya Commercial Bank Ltd & Another [2004] eKLR** as followed in **Patrick Mwangi & Another vs.**

Housing Finance Co. of Kenya [2013] eKLR, as well as Orion East Africa Ltd vs. Ecobank Kenya Limited & Another [2015] eKLR, to propound the argument that an injunction being an equitable remedy can only be granted in deserving cases, and hardly avails parties who come before the Court with unclean hands.

[8] In conclusion, Counsel for the Defendant submitted that the Court should be wary of parties who, upon default, come up with various excuses to challenge the lawful exercise of a chargee's statutory power of sale. Citing the cases of Mrao Ltd vs. First American Bank [2003] eKLR, Koileken Ole Kipolonka Orumoi vs. Mellech Engineering & Construction Limited & 2 Others [2015] eKLR and John Nduati Kariuki t/a Johester Merchants vs. National Bank of Kenya Ltd [2006] eKLR the Defendant urged the Court to find favour with the viewpoint that default would cause the sale of charged property, no matter the sentimental value attached; and that charged property is a commodity for sale for which damages would suffice as recompense.

[9] Order 40 Rule 1(a) of the Civil Procedure Rules provides that:

"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."

[10] And for any litigation to avail himself of the relief aforementioned, it is imperative to show that the principles laid down in the case of Giella vs. Cassman Brown & Co. Ltd (supra), have been met. It was held thus, in that case:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

[11] A *prima facie* case, as was aptly defined by the Court of Appeal in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123, thus:

"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."

[12] This being an interlocutory application, the Court need not examine closely the merits or otherwise of the Plaintiff's case. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others: Civil Appeal No. 77 of 2012, the Court of Appeal made this point 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 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. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

[13] With the foregoing in mind, I have given careful consideration to the application, the grounds raised in support thereof, the affidavits and the annexures relied on as well as the submissions made herein by Learned Counsel. It emerges therefrom that the Plaintiff was indeed granted several facilities by the Defendant at his instance, the first of these being the Diminishing Musharakah Sale and Lease Back Facility for **Kshs. 30 million** dated **23 July 2010**, a copy whereof was exhibited by the Defendant at pages 1 to 4 of the Defendant's Replying Affidavit. The facility was repayable over 48 months. The second facility was granted on **13 June 2011** for **Kshs. 60 million**, for the purpose of refinancing existing construction project. This was followed by a variation Diminishing Musharakah Sale and Leaseback Facility dated **18 April 2012** for **Kshs. 60 million**, for the purposes of refinancing existing construction project. It was repayable over a period of 72 months at **Kshs. 1,360,000/=** upon expiry of the moratorium. Finally, the Plaintiff was granted a similar variation facility on **3 December 2015** for **Kshs. 76,885,814.99** which was to expire on **15 January 2024**. Copies of these documents were exhibited by the Defendant at pages 10 to 17 of the annexures to the Replying Affidavit.

[14] A careful consideration of the rival affidavits and the written submissions filed herein further shows that these facilities were secured by a Legal Charge dated **4 October 2010** over **LR No. 209/7260/72** for **Kshs. 30 million**, a Further Charge dated **4 July 2011** over the aforementioned property and a Charge dated **10 August 2016** over **LR Nos. 209/7260/19388** and **19389**. Copies of these documents were exhibited at pages 18 to 91 of the Replying Affidavit. It was further conceded by the Plaintiff that, in the course of time, he defaulted in his repayments; and was accordingly served with statutory notices, including the notice dated **2 November 2016**, a copy whereof was exhibited by the Plaintiff as **Annexure AMS 6** to the Supporting Affidavit. That letter explicitly stated that it had been issued in addition to previous notices; whose copies were again resent with the notice of **2 November 2016**, namely:

[a] A copy of the 90-day statutory notice dated **28 May 2015** in respect of the Legal Charge dated **4 October 2010** and Further Charge dated **4 July 2011** in respect of the flats erected on **LR No. 209/7260/72**;

[b] A copy of the 40-day statutory notice dated **8 September 2015** and the notice of clarification dated **16 September 2015**.

These prior notices, though not exhibited by the Plaintiff, were attached to the Replying Affidavit as annexures at pages 92-99.

[15] Another aspect of this matter that appears to be uncontroverted is the averment by the Defendant that the Plaintiff has made several admissions of his indebtedness to the Defendant. At paragraph 10 of the Replying Affidavit, the particulars of the admissions were provided and evidenced as follows:

[a] By an admission at a meeting held on **20 February 2012** between the Plaintiff and two representatives of the Defendant. Minutes of that meeting have been annexed to the Replying Affidavit at page 116 and they confirm that the Defendant expressed concern about the Plaintiff's overdue accounts. The minutes confirm that the Plaintiff **"...expressed his strain on servicing the Kes. 60.0 mln facility within a tenor of 4 years with instalment of Kes 2.7 mln to fall due monthly..."** and that **"...He requested the bank to restructure the outstanding principal of Kes 57.7 mln by increasing the tenor to 7 years with equal instament of Kes 1.24 million monthly."**

[b] By a letter dated **8 April 2014**, exhibited at page 117 of the Replying Affidavit. The letter was evidently co-signed by the Plaintiff as a director of **Limon Investments Limited** and was written to the **National Bank of Kenya** seeking the transfer of the subject loans herein.

[c] By a letter dated **6 October 2014** by which the Plaintiff promised to provide additional security for facilities.

[d] By an admission at a meeting held on **16 October 2014** when the Plaintiff was advised to dispose of one of his properties. Minutes of the meeting, exhibited at page 119 of the Replying Affidavit, show that the meeting was called to discuss the serviceability of the Plaintiff's **Kshs. 60 million** DM facility; and

that the bank was concerned that the account had been overdue for the whole of 2014. The minutes read thus:

"The client confirmed that he's absolutely committed to servicing the facility. He explained the problems he had which resulted [in] the poor performance of the facility repayments. The problems ranging from below par occupancy of his property due to crackdown in Eastleigh earlier in the year as well as road constructions in Eastleigh which affected his textile business. He requested that bank officials to accept his earlier request of allowing him pay about Kes. 500,000 monthly until something changes in the market. He also argued that he is looking disposing some of his plain land in Eastleigh area so as to reduce the base facility amount."

[e] By a letter dated **19 January 2017**, annexed at page 120 of the Replying Affidavit. The letter was written by the Plaintiff to the Defendant in respect of the outstanding banking facilities. It states as follows in part:

"I humbly propose to settle the outstanding bank facility in the following manner:

I currently receive a monthly rental income of about Kshs. 800,000.00 from the secured assets. I propose to make a monthly instalment of Kshs. 600,000.00 on every 15th day of the month starting February towards the settling the facility.

I will in addition make a payment of kshs. 5,000,000.00 at the end of each year until full settlement of the facility. I will endeavour to increase the instalment as my business improves.

I trust that my proposal will meet your favourable consideration and that you will suspend the statutory notice issued on 2 November 2016 to allow for an amicable settlement of this matter..."

[16] The prima facie picture that emerges from the foregoing is that of acknowledgement of indebtedness on the part of the Plaintiff; and an acknowledgement that the Defendant has over the years exercised nothing but patience and understanding towards the Plaintiff. There is no indication that there is in existence a right of the Plaintiff's that has been violated or threatened with violation. Indeed, these averments were not rebutted by the Plaintiff. Thus, the Plaintiff has not only admitted that he failed to meet his monthly repayment obligations when he sought the restructuring of the repayment terms of the facility; but also that he failed to demonstrate that he employed the suggestions proposed by the Bank to enable him clear the arrears.

[17] In addition, there is uncontroverted evidence that the Plaintiff attempted to dispose of one of the flats that is the subject of the Charge, without the knowledge or authority of the Defendant. At paragraph 8 of the Replying Affidavit, it was averred that the Plaintiff was sued by a purported purchaser of one of the flats in **CMCC No. 533 of 2016: Abdilrashid Warsame & Another vs. Abdullahi Sheikh and Gulf African Bank**; and that a preliminary objection was therein raised by the Bank on the basis of the Charge over **LR No. 209/7260/72**. It is notable that no mention was made of this prior suit by the Plaintiff.

[18] On the question of whether the Defendant has charged interest and the exact nature of a Diminishing Musharakah Sale and Lease Back facility, the Plaintiff's argument appears to be that interest was not chargeable and yet, according to him, the Defendant charged interest. The Defendant has denied having charged interest as alleged. Its contention is that the facilities permitted it to charge profits at certain percentages as well as to levy certain charges, and that this is all it did. The facility letters do indeed provide for a profit rate and this is evident in the various facility letters exhibited at pages 1, 5, 10 and 13 of the Replying Affidavit. It cannot therefore be argued, as did the Plaintiff, that there was fraud or breach of contract on the part of the Defendant; and therefore the authorities relied on by the Plaintiff are clearly distinguishable from the facts hereof. In any event, it is now trite that an injunction would not be available just because there is a dispute over the amount owing.

[19] In Halsbury's Laws of England, Vol. 32 (4th Edition) paragraph 725 it is opined that:

"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."

[20] Similarly, in **Bharmal Kanji Shah And Another V Shah Depar Devji (Supra)** it was observed that:

"...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage..."

[21] In the foregoing premises, the Court is not satisfied that a *prima facie* case has been made out herein by the Plaintiff to warrant the issuance of the injunctive order sought. Accordingly, the need to give consideration to the questions as to whether the Plaintiff stands to suffer irreparable harm, or in whose favour the balance of convenience tilts has been thereby obviated, for in **Nguruman Limited V. Jan Bonde Nielsen & 2 Others (supra)** the Court of Appeal made it clear that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

[22] In the result, it is my finding that the Plaintiff's Notice of Motion dated **19 December 2016** lacks merit and is hereby dismissed, but with an order that the costs thereof be in the cause.

It is so ordered.

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

OLGA SEWE

JUDGE