REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 189 OF 2017

SPENTECH ENGINEERING LIMITED..................PLAINTIFF

VERSUS

METHODE LIMITED................................1ST DEFENDANT

KENYA DEPOSIT INSURANCE

CORPORATION (KDIC) as receivers of

CHASE BANK (KENYA) LIMITED...........2ND DEFENDANT

ROBERT WAWERU MAINA t/a

ANTIQUE AUCTION AGENCIES...........3RD DEFENDANT

RULING

Introduction

1. The motion by the Plaintiff dated 3 May 2017 is for an interlocutory injunction pending the hearing and determination of the suit. The Plaintiff seeks to restrain the Defendants from offering or advertising for sale by public auction or private treaty or howsoever from dealing with the property known as Title No. Ruiru East/Block 1/4409 and Title No. Ruiru East/Block 1/4410 ("the suit property").

2. The application was later amended on 5 June 2017 and the Plaintiff sought mandatory orders directed at the 2nd Defendant seeking that any sale proceeds realized from the property be appropriated towards settling the 1st Defendant's alleged debt with the Plaintiff.

3. The motion raises, besides the usual questions on interlocutory injunctions, a point of construction of statute. It is a short but important point of construction. It focuses upon the interpretation of *s.* 101(a) of the Land Act, No. 6 of 2012.

4. The Plaintiff is a building contractor. The 1st Defendant is a real property developer. The 2nd Defendant is the statutory receiver-manager of a commercial bank. The bank is currently under statutory administration. I will simply refer to the Plaintiff, the 1st Defendant and 2nd Defendant as 'Spentech', 'Methode' and 'Chase Bank' respectively. The essence of the dispute is whether Chase Bank may dispose

of the suit property to the exclusion of Spentech. Spentech's case is that Methode and Chase Bank do not have an unqualified right to dispose of the suit property without first settling a contractual debt due and owing to Spentech by Methode.

The facts

5. Methode is the registered proprietor of the suit property. In 2013, Methode decided to develop the then vacant suit property. It engaged Spentech. It engaged Spentech. It also agreed with Spentech that the latter would make an equity advance of Kshs. 15,000,000/ besides expending up to Kshs. 10,000,000/= on the construction. Spentech ventured into the works and engaged subcontractors. All did not seem to have been rosy and after various hiccups the construction works came to an end in late 2014.

6. In the meantime, in 2013 as well, Methode had obtained construction end-finance from Chase Bank. The facility by way of a term loan was initially Kshs. 50,000,000/= as disbursed in February 2014. It was later increased to Kshs. 61,803,976/= in June 2015. The suit property was pledged as collateral security and a legal charge duly registered on 19 February 2014 in favour of Chase Bank..

7. Spentech claims Methode defaulted in settling its indebtedness to Spentech. As of 14 May 2017, Spentech claims to have been owed Kshs. 39,501,056/63. Methode denies owing this amount.

8. Admittedly, though, Methode does not deny its indebtedness and default to Chase Bank. Instead, Methode heaps blame on Spentech for the delay in completion of the project and ultimate default which led to Chase Bank issuing statutory notices and placing the suit property up for sale.

9. The status of the suit property is that Methode has been unable to sell the individual apartments after it claimed that Spentech abandoned site and retained, what Methode calls, "forceful possession".

Spentech's case

10. Spentech contends that it used its funds to develop the suit property and is still owed monies by the Methode. According to Spentech, Chase Bank was always aware of Spentech's interest by virtue of the fact that Spentech has always been in occupation of the suit property and undertaking the construction works.

11. Additionally, it is Spentech's case that Methode is in breach of an express agreement and undertaking to transfer 4 Apartment-Units, being part of the development on the suit property, to Spentech.

12. Spentech further claims and accuses the three defendants of fraud in so far as Chase Bank granted a loan to Methode and took a charge over the suit property without taking into account Spentech's beneficial interest in the property. The fraud, Spentech says, is set to be perpetuated further if Chase Bank is allowed to dispose of the property without ensuring that Spentech's interest is catered for.

Methode's case

13. According to Methode, Spentech was the author of the misfortune now facing both Spentech and Methode.

14. Methode accuses Spentech of failing to complete the construction works and the project as agreed. Method also accuses Spentech of abandoning the project after payment of the final certificate raised by Spentech.

15. Methode then denies that Spentech had any interest in the suit property. Whilst admitting that it received financial aid from Spentech, Methode insists that the alleged Kshs. 15,000,000/= was an equity loan repayable with interest upon completion of the project while the advance of Kshs. 10,000,000/= had been fully settled by Methode when Spentech raised the 1st certificate for payment.

16. In summary, Methode denies owing Spentech any monies while admitting its indebtedness to Chase Bank.

Chase Bank's case

17. According to Chase Bank, Methode is indebted to it and as security for repayment of the debt there are valid legal charges over the suit property. Chase Bank contends that its right to realize the security may not be faulted. Additionally, Chase Bank asserts that the third party arrangements between Methode and Spentech do not in any way impair Chase Bank's rights as a chargee.

Arguments in court

18. In court, Mr. Arwa for Spentech essentially reiterated Spentech's case. Mr. Arwa stressed that Spentech was owed well over Kshs. 43,000,000/= and there was no dispute on this at all.

19. Mr. Arwa then pointed to *s.*101(a) of the Land Act and submitted that Spentech was entitled to a priority order with regard to disbursement of funds even if Chase Bank was to be allowed to proceed with the sale of the suit property. According to Mr. Arwa, Spentech's debt constituted a charge over the suit property. And to advance his argument further, Mr. Arwa stated that Spentech held a contractor's lien always prevailed over a mortgage's or chargee's rights until and unless the contractor's debt was settled. For this proposition Mr. Arwa not only relied on S.101(a) of the Land Act but also the South African case of **Fynbosland *v* Torro Ya Africa (Pty) Ltd & 2 Others Mafikeng High Court Case No. 1861 of 2011**. Mr. Arwa also relied on the 9th edition of Hudson's legal commentary "Building & Engineering Contracts".

20. Mr. Muriuki, who appeared for Chase Bank, was clear that *s.*101(a) of the Land Act was not applicable as it only related to statutory charges and not to every debt owed by the chargor or proprietor of the charged property.

21. Mr. Muriuki additionally contended that, in any event, the amount claimed by Spentech was still the subject of a dispute and had never been adjudicated upon to bind both Methode and Chase Bank. According to counsel, to admit and prioritize Spentech's claim meant suspending the sale of the charged property in perpetuity.

22. Counsel finally submitted that the legal charge always had priority over other debtors, especially the unsecured debtors save only as stated by statute. In this regard, Mr. Muriuki placed reliance on the cases of **China Yong Tai Engineering Co. Ltd *v* Ravasam Development Co. Ltd & Equatorial Commercial Bank Ltd [2016] eKLR** and also **Continental Developers Ltd *v* Sauti Cooperative Society [1998] eKLR.**

23. Ms. Adhiambo for Methode was more candid. Having admitted Methode's indebtedness to Chase Bank, Ms. Adhiambo submitted that the issues between Spentech and Methode were not as clear cut as Spentech played out. Spentech, according to Ms. Adhiambo was in breach of the contract. Counsel denied that Spentech were owed any monies by Methode. Ms. Adhiambo referred the court to the various interim certificates for payment issued by Spentech. According to counsel all the certificates for payment had been settled. Counsel pointed out that Spentech had failed to meet the conditions for the grant of an interim injunction.

Discussions and Determination

24. I am dealing with an application for interlocutory injunction and the principles were long established in the case of **Giella *v* Cassman Brown & Co. Ltd [1973] EA 358.** An applicant must satisfy the court that he has a prima facie case with a probability of success and that if an injunction is not granted the applicant will suffer irreparable loss, beyond any reparation through damages. An injunction is itself an equitable and discretionary remedy and the applicant needs to also persuade the court that it is appropriate in all the circumstances to exercise discretion in favour of granting an order for injunction. All the

circumstances of the case are thus relevant including the conduct of the parties. This is to ensure that justice is done either way. The court in the meantime must also be hesitant, in the context of an application for injunction about embarking upon any final determination of substantive issues. There is, to put it in other words, no room for a mini-trial at an interlocutory stage.

25. In the instant case various facts are not in dispute. It is not in controversy that Methode and Spentech ventured into an arrangement. Methode, as the developer, agreed with Spentech for the construction of apartments on the suit property. Spentech was to undertake construction works at the cost of Methode. Spentech was also to assist Methode financially. Spentech's financial assistance is settled at an aggregate of Kshs. 25,000,000/=. It is not further disputed that the construction works commenced though the parties part ways as to whether there was completion in time or at all.

26. It is common cause as well that Methode obtained a financial facility from Chase Bank subsequent to its arrangement with Spentech and after Spentech was already on site. As security for the advance, Spentech pledged the suit property to Chase Bank by way of a registered first legal charge.

27. The loan advance was not prepaid in time leading to Chase Bank issuing the requisite statutory notices to realize the security. It is also not in dispute that Methode is still indebted to Chase Bank and the chargee's statutory right to sale has accrued in favour of Chase Bank.

28. There is however controversy as to whether Methode is still indebted to Spentech. Spentech also contests the right of Chase Bank to sell the suit property as Spentech claims an equitable or beneficial interest therein and also insists that its now disputed debt ranks first, in terms of priority, to that of Chase Bank.

Of a building contract, a Memorandum of Understanding and a contractors lien and equitable interest in property

29. As I understood Spentech's case, Spentech claims not only a lien, a construction lien over the suit property but also an equitable and beneficial interest in the property.

30. The equitable interest is claimed to have arisen by dint of a Memorandum of Understanding whereby Methode is said to have agreed to transfer 4 apartments to Spentech in satisfaction of the equity loan advanced by Spentech to Methode. Spentech asserted that the rights of Chase Bank as chargee under the charge documents do not have priority over the rights of the Spentech under the building agreements even though the charge is registered because of both the construction lien and Spentech's equitable interest in the property. According to Spentech, the rights of Chase Bank even if Chase Bank sold the suit property would have to be subordinated to those of Spentech.

31. I will start from the premise that the property charged in favour of Chase Bank included not just the realty charged but also all developments thereon.

32. The registered legal instrument created a charge over the premises which were defined in the Charge Instrument to mean the land compromised in the two titles as well as the buildings, fixtures, fittings, attritions and improvements from time to time forming part of the land. Construction works undertaken and completed would certainly be part of the premises charged.

33. I did not hear Spentech to claim or submit that it notified Chase Bank of its interest, equitable or otherwise, in the suit property. There is also no evidence of any notice to or of Chase Bank's knowledge of the agreement between Methode and Spentech. In my judgment and in the absence of such notice or presumed knowledge, Chase Bank cannot be bound, even in equity to give effect to Spentech's rights, if any.

34. Spentech contended that even as the legal charge in favour of Chase Bank was being created in 2014, Chase Bank was aware of Spentech's presence and possession of the suit property. This may very well be true. Spentech certainly as the contractor had possession of the site pursuant to the building contract.

35. In my preliminary view, however, and based on the affidavit evidence the possession of site by Spentech may not be viewed as notice of Spentech's interest prior to Chase Bank's acquisition of a legal interest through the charge instrument.

36. It is normal for construction and property sites to be handed over to contractors. A contractual license to possession in a building contract however exists simply to enable a contractor to perform and fulfill his obligations to the employer or developer. The employer or developer has in turn an obligation to pay the contractor for performing his obligations. If the arrangement goes beyond payment and grants the contractor interest in the property then there is need to do more to let the world be aware of such interest. This may be achieved through a simple registration of any claim on the property against the title register. This is not the case in the present suit. It would be stretching one's imagination too far to make the assumption that a contractor on site also has interest in the land besides his right to be paid for performing his obligation to build.

37. It brings me to the agreement or Memorandum of Understanding allegedly made between Methode and Spentech.

38. I have read through the Memorandum of Understanding as well as the supplemental agreements to it. The copy exhibited by Spentech is not executed by Methode. Attempts consequently by Spentech to rely on the Memorandum and subsequent letters or correspondence to show that Spentech had a beneficial interest in four apartments erected on the suit property would not, prima facie, lead to success. The provisions of *s*.3 of the Law of Contract Act (Cap 23) are relatively clear as to how interest in land ought to be secured and transferred.

39. A quick read of the Memorandum of Understanding, even assuming it could be enforceable, would also lead to a covenant under the Memorandum of Understanding, by which the equity loan by Spentech was to be repaid upon the sale of the units. Any transfer of the apartments to Spentech was only to act as a guarantee pending such payment. It would appear that the parties were not intent in Spentech having absolute interest in the apartments. I must however quickly add that subsequent correspondences which do not appear to have come to fruition appear to show Spentech pressing for the absolute assignment of the four apartments.

40. I am unable therefore to hold that Spentech has established a prima facie case that its alleged equitable interest in the suit property, and in particular over some unidentified four apartments ought to take precedence over Chase Bank's legal interest created by the charge. I need not emphasize the equitable doctrine that equity follows the law; it respects defined rights at law and does not override them.

Section 101 of the Land Act

41. Spentech's alternate argument was that by dint of a contractor's lien and pursuant to the provisions of *s*.101(a) of the Land Act, any sale proceeds realized by Chase Bank was first to be utilized in settling the debt owed to Spentech before being appropriated by either Chase Bank or Methode. According to Chase Bank however its legal rights to appropriate the sale proceeds as provided under statute could not be subordinated to Spentech's or Methode's. Chase Bank also placed reliance on the provisions of *s*.101 of the Land Act.

42. Section 101 of the said Act provides as follows:

> ***101. The purchase money received by a chargee who has exercised the power of sale shall be applied in the following order of priority-***
>
> > ***a) First, in payment of any rates, rents, taxes, charges <u>or other sums</u> owing and required to be paid on the charged land;***
> >
> > ***b) Second, in discharge of any prior charge or other encumbrance subject to which the sale was made;***

c) Third, in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempted sale;

d) Fourth, in discharge of the sum advanced under the charge or so much of it as remains outstanding, interests, costs and all other money due under the charge, including any money advanced to a receiver in respect of the charged land under Section 92; and

e) ***Fifth, in payment of any subsequent charges in order of their priority, and the residue, if any, of the money so received shall be paid to the person who, immediately before the sale, was entitled to discharge the charge.***

43. A building contractors' bill is not expressly provided for under the Act. The question, in my view, even at this very interlocutory stage is whether a building contractors bill falls within the particular or general words of *s*.101(a) of the Land Act. The words "or other sums" owing and required to be paid on the charged land are apparently wide and there may be need to construe the same *ejusdem generis*.

44. The *ejusdem generis* rule of statutory construction is basically to the effect that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same character. Of the word " other", Strouds Judicial Dictionary 3rd Ed says the following in relation to the ejusdem generis rule:

"***Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated."***

45. Effectively, if one can find that things described by particular words have a common characteristic which constitutes them as a genus then you ought to limit the general words which follow them to the things of that genus.

46. In the present case all the items susceptible to payments on the charged land are described by particular words. The words in their natural meanings appear to have the common characteristic of outgoings which concern and touch on land. They do not include any receipts. They do not in my view constitute ordinary debts. They constitute regular burdens on the land in the form of taxation or duties payable regularly, whether monthly, semi-annually or yearly. The general words "other sums owing" in my view, should also only apply to articles and items which possess that characteristic. It should not be such as it is fetched on the person or proprietor as a personal covenant or other debts for that matter.

47. Additionally, the context and intent of *s*.101 of the Land Act can not in my view be ignored. When land is used as security and the chargee ultimately exercises its right of recovery of debt through realization of the security, it is intended that it is not only the chargee who benefits but that any purchaser does not inherit any monetary burdens payable on the land. Such other monetary burdens may include regular service charge and management fees as well as any annual repair costs but not non-regular third party claims not regularly chargeable on the land or property.

48. I am not convinced at this stage that a contractors claim would fall to be 'other sums owing' and required to be paid on charged land unless one adopts a semantic comparison with the particular words of that subsection of the statute. A contractor's claim does not in my judgment appear to fall in the same class or bundle as the traditional outgoings on land.

49. I return an initial interlocutory verdict that, prima facie, a contractor's bill is not part of the charges on land under *s*.101(a) of the Land Act.

Conclusion and Disposal

50. The result is that, in my view Spentech has not established a prima facie case with probability of success. Additionally, I am unable to see how Spentech may claim that it will suffer irreparably and beyond compensation by damages.

51. The application by Spentech must, for all the above reasons, fail and it does. Chase Bank may exercise its accrued and undoubted right to realize the security as a chargee without hindrance by Spentech who must still prove its monetary claim as against Methode. I will not make any order as to appropriation of any sale proceeds as *s*.101 of the Land Act is relatively clear.

52. The application by way of Notice of Motion dated 5 June 2017 is dismissed with costs to the Methode and Chase Bank.

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

J.L.ONGUTO

JUDGE