REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO 5 OF 2016

AMIT AGGARWAL.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED ….....DEFENDANT

R U L I N G

1. **Amit Aggarwal** (Applicant) is the administrator of the estate of his late father **Gurcharan Dass Aggarwal** (Deceased). In or around 1999, the deceased took a facility from **National Bank Of Kenya Limited** (Respondent) and offered the following properties as security. **Eldoret Municipality Block 2/28, 32 and 34, Eldoret Municipality Block 8/123, 301, 302 and 303, Eldoret Municipality Block 14/802 and 805 and Eldoret Municipality Block 777/482** (charged properties).

2. The deceased passed on on 23/8/2005 after repaying part of the money advanced to him . The Applicant had to step in and continue repaying the money advanced. Prior to the demise of the deceased, the deceased had agreed with the Applicant on the mode of repayment of the money advanced. In 2007, the Applicant agreed with the Respondent on how he was to repay the amount due to the Respondent.

3. The Applicant then started repaying the amount as per agreement save for a short period in late 2007 and early 2008 when he did not do as agreed due to disruption of business following the disturbances in the country during that period. The Applicant, however later resumed repaying the advanced money only for him to be confronted by a demand from the Respondent in 2015 who demanded in excess of seven million from him and then threatened to advertise the charged properties for sale.

4. It is the Respondent's threats to auction the charged properties which made the Applicant to move to court seeking orders of injunction and provision of a complete statement in respect of the facility. The Applicant contends that he has repaid the entire facility and has over paid the Respondent by a figure in excess of f**our million shillings**. That the Respondent has not issued notices as required under section **90** and **96** of the **Land Act of 2012.**

5. The Applicant contends that he will suffer irreparable loss which will not be compensated in monetary terms if the orders of injunction are not granted. He further contends that the Respondent has not given the basis for the amount demanded which to him has been fully repaid and that there is an over payment.

6. The Respondent has opposed the Applicant's application based on a replying affidavit sworn on 11/2/2016 and filed in court on 17/2/2016. The Respondent contends that the Applicant's application has no merit, the same is frivolous and is an abuse of the process of the court. That the Applicant's affidavit in support of the application is contradictory in that in one paragraph, the Applicant states that he has

repaid fully the facility and has overpaid and in another paragraph, he says that he is ready and willing to clear the balance owed.

7. The Respondent further contends that the application has not met the threshold for grant of temporary injunction and that no special grounds have been shown to warrant the court to grant mandatory order at interlocutory stage. That contrary to the Applicant's claim that no statutory notices were given, the same were actually given and that the Applicant is out to delay this matter and avoid meeting his contractual obligations.

8. I have carefully gone through the Applicant's application as well as the opposition to the same by the Respondent. I have also gone through the submissions filed by counsel for the respective parties. The issues which come out for determination are firstly whether there were statutory notices given as required. Secondly whether the Applicant has made out a case for grant of a temporary injunction. Thirdly and lastly whether a mandatory order for provision of statement of account can be made at interlocutory stage.

9. On the first issue, the Applicant seems to argue that there were no statutory notices given as provided under section **90 and 96** of the **Land Act of 2012.** Contrary to the Applicant's allegations that no statutory notices were served, the Respondent has annexed a notice issued pursuant to Section **90** of the **Land Act of 2012** as annexture 3(a). The Respondent has also annexed another notice pursuant to section **96 of the Land Act of 2012**. This is annexture 4a in the Respondent's replying affidavit. The first notice was sent by registered post and was addressed to the deceased. The second notice was also sent by registered post and it was addressed to Turbo Eldoret Highway a name in which the Applicant admitted the deceased was trading under. The postal address in both notices was the address given by the deceased when he took the facility. The two notices fully complied with the requirements of the Law as set out Under **Section 90 and 96 of the Land Registration Act**. There is evidence of postage. The Applicant cannot therefore argue that no notices were issued as required. The Applicant seems to be arguing that the Respondent's rights had not accrued. This will come out in the main suit. I therefore find that there were statutory notices issued which were in full compliance with the statutory provisions.

10. On the issue as to whether the Applicant has made out a case for grant of temporary injunction, a look at the Applicant's claim is necessary. The Applicant is contending that he has paid the amount due and has actually overpaid the Respondent in excess of over four million shillings. After the demise of the deceased, it was agreed between the Applicant and the Respondent that the deceased had paid **Kshs 5,800, 422.90** and that the amount payable was **Kshs 10,756, 972/-.** It was further agreed that this outstanding amount was to be repaid at the rate of **Kshs 270,000/=** per month for three (3) years with effect from June 2007. It was also agreed that the Applicant was to sell two properties by private treaty to assist in reducing the amount due. In the event of default, the entire agreement was to be nullified and the charged properties were to be sold. This agreement was reached on 26/6/2007.

11. On 28/2/2008, eight (8) months after it had been agreed that the balance of the money owed was **Kshs 10,756,972/=**, the Respondent wrote to the Applicant indicating that the outstanding amount was **Kshs 23,374,501.40.** The Respondent required him to pay **Kshs 540,000/=** to cover the instalments for the month of June and December 2007. The Applicant responded to the Respondent's letter through his letter of 25/4/2008 in which he explained the reason why he did not make payment for the month of June and December 2007. He promised to repay the two instalments besides making the monthly repayments as agreed. The Applicant has provided evidence on how he made payments to the Respondent. This is according to the statements provided to him. According to his calculations based on statements availed to him, he had made a total deposit of **Kshs 14,855,000/=.** The amount which was agreed to be due in June 2007 was **kshs 10,756,972/-**. He therefore argues that he has over paid the Respondent by **Kshs 4,098,028/-.**

12. It is important to note that the Applicant had no statements for the period between 2008 and 2011. His calculation was therefore based on the statements available to him. The Applicant wrote to the Respondent on 4/6/2015 requesting for statements between June 2007 and April 2011. There was no response from the Respondent. When the Applicant filed this application, the Respondent, responded but

it did not provide any statements for the period between June 2007 and April 2008. The only statements which were shown were for the period between 2012 and April 2015. The Respondent did not show how they arrived at the amount of **Kshs 7,255,001.42** which it is claiming from the Applicant.

13. The Applicant had pointed out in his letter of 25/4/2008 that the Respondent appeared not to have adjusted its records regarding the debt. This is because as at June 2007, the outstanding amount was **Kshs 10,756,972/-.** Eight months later on 28/2/2008, the Respondent was demanding **Kshs 23,374,501.40.** This is despite the fact that the Applicant had made some instalments towards liquidating the amount due. It is clear that the Applicant has made out a prima facie case which the Respondent ought to be called upon to explain. What amounts to a prima facie case was aptly captured by the court of Appeal in the case of ***Mrao -vs- First American Bank (k) Ltd.***

When the Judges stated as follows:-

> ***"A Prima facie case in a civil application includes but is 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".***

The Applicant has demonstrated that the Respondent might not be right in their claim. He has sought for statements to back the Respondent's claim but the Respondent has declined to provide some statements. The Respondent has to be called upon to explain this.

14. The second consideration under the Principles in the ***Giella -vs – Cassman Brown case*** is whether damages will be an adequate remedy. In the instant case, the Respondent is demanding a sum of slightly over seven million. The Respondent has threatened to auction the Applicant's eleven properties. A valuation has been done on some of the properties. One of the properties that is **Eldoret Municipality Block 6/6** has been valued at **Kshs 49,800,000/-**. **Eldoret Municipality Block 8/301** has been valued at **Kshs 7,000,000/-**. **Eldoret Municipality Block 2/32** has been valued at **Kshs 9,000,000/-**. **Eldoret Municipality Block 2/28** has been valued t **Kshs 15,000,000/=**.**Eldoret Municipality Block 2/34** has been valued at **Ksh 20,300,000/-**. The five properties which have been valued are in excess of over one hundred million shillings. The Respondent is seeking to recover about seven million shillings. If the charged properties were to be sold it will cause irreparable loss to the Applicant. He will not find other properties in the same location if he were to succeed and the issue of being compensated comes in.

15. In certain cases circumstances surrounding the case ought to be taken into account when considering whether damages will be an adequate remedy. For instance in the present case, the Respondent is seeking to recover about seven million. There is a dispute on how the seven million is arrived at. Some of the charged properties have been valued at over **Kshs 100,000,000/=.** There are eleven (11) properties which were charged. Only five have been valued. It will be ridiculous to allow properties of millions of shillings to be sold just because of an alleged debt of about seven million which prima facie appears to be genuinely contested. The fact that the respondent may compensate in case the Applicant succeeds cannot apply in the circumstances. This is a temporary injunction being sought. If the Respondent wins, it will not have lost as much as the Applicant will lose in case his properties are sold and he wins the case. There must be a balance between what is owed and what is at stake.

16. I entirely agree with the reasoning of Justice Ringera as he then was in the case of ***Waithaka -vs- Industrial and Commercial Development Corporation [2001] KLR 374 at 381*** where he addressed the issue of damages in the context of the ***Giella -vs- Cassman Brown case.*** He argued that there are instances where an injunction can issue even when damages are adequate. I have demonstrated herein above that this is one case where an injunction can issue even when compensation is possible.

17. On the issue of balance of convinience, I have stated in paragraph 15 herein above that this is a case of balancing which side may suffer more that the other. For the reason given hereinabove, I find that the balance of convinience tilts in favour of grant of injunction.

18. The third and last issue for determination is whether a mandatory order can be given at interlocutory stage. There are a number of decisions which have set out instances when mandatory orders can be given at interlocutory state. One of the cases which summarises the principles for grant of mandatory orders is the case of ***Kenya Breweries Ltd & another -vs- Washington Okeyo [2002] 1 EA 109*** where the Appeal Judges quoted with approval a text in **Vol.24 of Husbury Laws of England 4th Edition paragraph 948** which reads as follows:-

> ***" A mandatory injunction can be granted on an interlocutory application as well as the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is a simple one and summary one which can be easily remedied, or if the Defendant attempted to steal a match on the Plaintiff ... a mandatory injunction will be granted on an interlocutory application."***

In the instant case, the Applicant is seeking to be provided with a complete statement of account in respect of the facility. What the Applicant is seeking is a matter which is straightforward. The Applicant's request is clear. He wants statements so that he can verify the basis for the Respondent's claim.This is a matter which ought to be addressed at once. The statements are with the Respondent. If the Respondent has nothing to hide, there is no reason why it should not avail the statements.

19. The test for grant of a mandatory order at inter-locutory stage is whether at the end of the trial, the court will be satisfied that it made the right order in the first place. In the circumstances of this case, there is no conclusive decision which will be made at the end of the case without statements being availed. There is therefore nothing wrong at the moment to order that statements be availed to the Applicant as ultimately, they will be required for a just and fair determination to be made in this case. I therefore find that a mandatory order is necessary at this inter-locutory stage.

20. For the foregoing reasons, I find that the Applicant's application is well founded. The same is allowed with the result that the interim orders of injunction which were granted are hereby confirmed and shall last until the hearing and determination of this suit. The Respondent is hereby ordered to provide a complete statement of account in respect of the facility. The Applicant shall have the costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this 17th day of May 2016.

E. OBAGA

JUDGE

In the presence of M/s Ngugi for Mr Gumbo for Defendant /Respondent.

Court Assistant – Isabellah

E. OBAGA

JUDGE

17/5/16