REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 333 OF 2013

ST. ELIZABETH ACADEMY - KAREN LIMITED…….....PLAINTIFF

- VERSUS -

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. This Ruling is in relation to 2 applications which were filed by the plaintiff, **ST. ELIZABETH ACADEMY – KAREN LIMITED.**

2. In the first application the plaintiff sought;

> ***a) An interlocutory injunction to restrain the 2nd Defendant, GA LIFE ASSURANCE LIMITED, from advertising for sale, selling, evicting, disposing of our otherwise howsoever from completing the transfer of the suit property to itself. The said suit property consists of 2 titles namely L.R. No. 1159/377 and L.R. No. 1159/141 DAGORETI ROAD, KAREN.***
>
> ***b) A review of the court's decision dated 16th December 2014, and in lieu thereof granting an injunction to restrain the defendants from selling the suit property, taking possession of, appointing a receiver, evicting the plaintiff or concluding the transfer of the suit property.***
>
> ***c) An order under the doctrine of lis pendens, to prohibit ALL FURTHER REGISTRATION of any kind of right, title or interest in the suit property. The said order should apply to all the Land Registries, Government Departments and all other registering authorities.***
>
> ***d) A declaration that any transfer of the suit property was illegal, unlawful and therefore null and void.***
>
> ***e) An order for the re-conveyance of the suit property, back to the plaintiff, and a declaration that the plaintiff had discharged any claims from the 1st Defendant, NATIONAL BANK OF KENYA LIMITED.***
>
> ***f) A mandatory injunction to compel the 1st defendant to discharge all existing legal charges, and also to immediately release to the plaintiff the log books of its 2 vehicles, whose particulars were provided, as follows;***
>
> > ***i) Log books for vehicles, Registration Numbers KBL 653 A and KBL 654 A;***

ii) Legal Charge over L.R. No. Mainland North/Section 11/395, Utange Area, Mombasa;

iii) Legal Charge over L.R. No. 13867/8;

iv) Legal Charge over L.R. No. 1159/141;

v) Legal Charge over L.R. No. 1159/377;

vi) Legal Charge over L.R. No. 5914/15; and

vii) Legal Charge over 5914/18.

g) A review of the order No. 7 dated 31st July 2013, by ordering the Defendant to account for the debit of Kshs. 5,907,140/- which was made on 12th August 2014.

h) An order that accounts be taken before full trial.

i) In the Alternative, order that the Terms of the Charge be re-opened and revised by ;

ii) Revising the repayment terms and effecting an amortization schedule, to balance the interests of the parties;

iii) Apportioning the receivable income in St. Elizabeth Karen Academy between the chargor and the chargee;

iv) Nullifying the demand by the Defendant that the disputed loan be repaid forthwith and in lieu thereof, reschedule the loan (if any) over the remaining 6 years period.

j) Restrain the Law Firm of Rachuonyo & Rachuonyo Advocates from acting for the 1st Defendant.

3. The plaintiff then laid down the basis upon which the application was founded.

4. The first point was that on 20th May 2015**, L.R. No. 1159/377** was sold and transferred to the 2nd Defendant. According to the plaintiff, the said sale was done by the 1st defendant in collusion with the 2nd defendant.

5. The plaintiff also confirmed that on 16th December 2014, the Court dismissed the plaintiff's application for an injunction. It is the understanding of the plaintiff that the court's said decision was informed by the admission made by the plaintiff, that it owed the bank, the sum of Kshs. 250,000,000/-.

6. Prior to delivering its ruling, the Court is said to have allowed the plaintiff to sell a portion of the charged properties by private treaty. And the bank is said to have consented to the sale.

7. According to the plaintiff, the bank had agreed to discharge all the other properties after receiving payment of Kshs. 300,000,000/- out of the proceeds of the sale by private treaty.

8. The plaintiff sold off 10 acres of land, for Kshs. 380,000,000/-, out of which Kshs. 340,000,000/- was paid to the bank. However, the plaintiff did not bring this information to the attention of the court, prior to the ruling dated 16th December 2014.

9. The bank has provided copies of correspondence which suggests that the plaintiff was aware that there would still be an outstanding balance, after the plaintiff's account was credited with Kshs. 300,000,000/-.

10. In any event, the plaintiff could have provided the information to the court prior to the determination

of the first application for an injunction, if the said information was deemed important. The plaintiff cannot blame the court for not taking into account information which was not available to the court.

11. And because the information was already available previously, it cannot be said to constitute new and important facts which the plaintiff could not have had at the time it canvassed the first application. Accordingly, those facts cannot be the basis for the review of the ruling delivered on 16th December 2014.

12. As regards the injunction sought against the 2nd defendant, the plaintiff submitted that the said defendant;

> ***"….is likely to proceed in secret and in haste, to defeat the cause of justice, charge the said land or evict the plaintiff from the suit premises or alienate the same unless an urgent order of injunction is issued against it".***

13. What evidence did the plaintiff provide to back up its said submission?

14. The evidence was that the 2nd defendant, on 30th July 2015, filed a plaint in court, seeking the eviction of the plaintiff.

15. The suit cannot be described as something that was being done in secret.

16. Secondly, by seeking the intervention of the court, the 2nd defendant cannot be said to be trying to defeat the cause of justice. Ordinarily, people come to court to seek justice; not to defeat it.

17. The question as to whether or not the plaintiff made an overpayment is a seriously contested matter. At this stage, I am unable to conclude that the plaintiff has demonstrated a *prima facie* case of overpayment.

18. Indeed, there is a finding by the court that the plaintiff had admitted its indebtedness to the bank.

19. The plaintiff accused the bank of clearly demonstrating its efforts to clog the plaintiff's equity of redemption, after the loan was allegedly paid. The said demonstration was comprised in the bank's decision to ignore the plaintiff's request for a meeting.

20. Surely, the bank was not under a duty to agree with the plaintiff. Parties may choose whether or not to meet. But if one party chooses not to engage in discussions, that of itself, cannot be deemed as proof of a desire to clog the equity of redemption.

21. A chargor has a legal right to redeem his security, by clearing the debt. Therefore, when the chargor has paid-off his loan, he does not need to plead with the lender about the redemption of the security. Upon paying-off the loan, a borrower may demand the discharge of his security. The borrower who has cleared his loan does not need to request the lender to talk to him. He can ask the court to safeguard his rights.

22. The plaintiff asserted that there was collusion between the defendants. However, there is no *prima facie* evidence tendered to demonstrate the alleged collusion.

23. The plaintiff also did not place before the court, evidence to establish that the purchaser had actual or constructive notice of the bank's alleged dishonesty or lack of propriety in the manner in which the suit property was sold.

24. The allegation that the defendants were involved in some conspiracy, when the suit property was being sold, remains, at the moment, just that: an allegation.

25. It is common ground that the property was sold whilst the case was already in court. The plaintiff has relied on the following words of Ogola J. in **FRANCIS MUREITHI GITUKU Vs PATRICK KIARIE KAGWANJA & 3 OTHERS Hccc No. 456 of 2005;**

> ***"While there are no orders restraining him from dealing with the suit property as he wishes, the fact that the matter is being heard, and may be concluded soon, should itself restrain the 1st Defendant from taking any adverse action on the suit property. In fact, the taking of an action which amounts to disposing of the suit property lends credible evidence to the allegations by the plaintiff that the sale of the property to the 1st Defendant was tainted with conspiracy, price fixing, fraud and illegality".***

26. Whilst I respect the view expressed by my learned brother, I regret that I am unable to agree with it.

27. The fact that a property was the subject matter of an ongoing court case, is not, of itself deemed to constitute a bar to the disposal or other dealings with the property. If that were the position, then plaintiffs would not need to prosecute applications for interlocutory injunctions.

28. On the other hand, I am not encouraging defendants to dispose of suit properties, when cases were still ongoing.

29. But the very reason why the plaintiff brings an interlocutory application for an injunction is because the only sure way of safeguarding the suit property when the case was still pending, is by persuading the court to grant the appropriate injunctive relief.

30. The plaintiff submitted that the loan had escalated from Kshs. 317,252,856/50 as at 25th June 2013, to over Kshs. 442,087, 383/82 as at December 2015. The said escalation was said to have taken place without any explanation.

31. The plaintiff follows up that submission by producing legal authorities as follows;

a) JOSEPH MURIITHI GICHOBI Vs KENYA COMMERCIAL BANK LTD & ANOTHER Hccc No. 25 of 1999, in which Mbaluto J. said;

> ***"If the claim by the mortgagee is excessive and has no legal foundation, it follows that the mortgagee can be injuncted. In the instant case the plaintiff complains that the amount outstanding has been artificially increased by the levy of illegal interest on loans which had an upper limit to the rate of interest that could properly be charged. By reason of those illegal interest charges, the plaintiff complains that he is unable to service the loans. Given all those factors, the plaintiff is clearly entitled to have the outstanding balances on his loans corrected so that he can be required to repay what is properly due from him to the defendant".***

b) SAMAKI INDUSTRIES LTD Vs BULLION BANK LTD & ANOTHER Hccc No. 485 of 1999 *(At Mombasa)*, in which Hayanga J. said;

> ***"What we have here is a situation where the bank expressly charging interest rates and disclaiming others as being erroneous, and failing to notify the mortgagor which one of the three is being charged. The consequence of that is that the bank is now claiming money which is not due from the charge/mortgage, but from an own fictitious contract. Such amount is not due under the charge and the court can only adjudge chargor liable by shutting its eyes to a factual reality or willfully suppressing the fact that the bank is acting out of contractual terms".***

32. The bank had reserved a right to vary the applicable rates of interest, without notice to the borrower. Based on that term, the bank varied the rates of interest.

33. The court held that the result was an *"indefinite unknown stipulation"*, as the borrower had no way of ever knowing what to expect, or from what date.

34. In the case before me, the court had already made a ruling on the issue concerning whether or not the plaintiff owed the sums claimed. It is not open for me, at this interlocutory stage, to have a fresh look at that same issue.

35. The 2 authorities are thus completely distinguishable from this case.

36. From the material currently provided by the plaintiff, I cannot find that the bank had either charged illegal interest, or that the bank was claiming money which was not due to it, from the plaintiff.

37. In **SHAROK KHER MOHAMED ALI & ANOTHER Vs. SOUTHERN CREDIT BANKING CORPORATION LIMITED & ANOTHER Hccc No. 659 of 2007,** Warsame J. *(as he then was)* expressed himself thus;

> ***"The right to sell by private treaty is not available and cannot be exercised by the mortgagee unless and until the mode by public auction has attempted but failed due to the conduct of the borrower. Where a chargee resorts to sell by private treaty without attempting to sell by public auction, the resulting transaction would be void ab initio".***

38. Pursuant to Section 98 of the Land Act 2012, the powers incidental to the Power of Sale includes the sale by private contract at Market Value.

39. It is in the light of that express provision that the decision of Warsame J. should be considered. In other words, whether or not the decision may have been sound as at 11th April 2008 when it was delivered, the Land Act 2012 expressly recognized the power granted to the chargee to sell by private contract.

40. Section 98 (4) of the Land Act, 2012 provides as follows;

> ***"Upon registration of the land or lease or other interest in the land sold and transferred by the chargee, the interest of the chargor as described therein shall pass to and vest in the purchaser free of all liability on account of the charge, or on account of any other charge or encumbrance to which the charge has priority, other than a lease easement to which the chargee had consented in writing".***

41. Pursuant to that express statutory provision, it would appear, on a *prima facie* basis, that the registration of the transfer to the 2nd defendant may be difficult to upset.

42. I also find that the alleged sale at an undervalue does not give rise to an irreparable loss and damage. I so hold because if the plaintiff does ultimately prove that the property was sold for much less than its Forced Sale Value, that would show up the extent of the loss sustained. In other words, the plaintiff would have demonstrated that the property should have been sold for a much higher figure. Such a demonstration would also constitute proof of the loss sustained. And if the quantum of loss is ascertainable, as alluded to by the plaintiff, it is capable of being compensated by an award of appropriate damages.

43. In summary, I find as follows;

> ***a) The court cannot grant an injunction to restrain the purchaser from completing the transfer as the same is already complete.***
>
> ***b) The court cannot issue an order to stop the purchaser from advertising for sale, selling or disposing of the suit property, because such an order would be speculative. The plaintiff did not demonstrate that there was any real danger that the purchaser was about to start doing any of***

those things.

c) As the bank had already sold the suit property, it cannot sell it again. Therefore, the court would be acting in vain if it issued an injunction to restrain the bank from selling the property.

d) It has not been shown that the defendants had started taking any steps intended to lead to the eviction of the plaintiff. Therefore, the court declines the plaintiff's request for an order directed at something which may not happen.

e) At this stage, there is no evidence, even on a prima facie basis, to show that the transfer of the suit property was illegal, unlawful, and therefore null and void. In any event, such a finding would be so final that to grant it now would be akin to pre-judging the substantive case, and thus tying the hands of the trial court: I decline to do so.

f) It is premature, in my considered opinion, to order re-conveyance of the suit property, back to the plaintiff.

g) Considering that the plaintiff was seeking an order for the taking of accounts, it would be inconsistent and indeed contradictory to order, at this stage, that the bank be compelled to discharge the securities because the plaintiff had repaid all the loan facilities.

h) The re-opening and the revision of the terms of the Charge was a most unusual relief, which was akin to re-writing the contract between the parties. The plaintiff has not demonstrated why such an order should be made at this interlocutory stage.

i) The plaintiff has chosen to call as its witness, an advocate currently acting for one of the defendants. Surely, the plaintiff's said decision should not prejudice the defendant. If it were allowed, parties would easily lock out advocates from representing the parties against whom they were fighting.

44. In a nutshell, the plaintiff has failed to satisfy the court that it is entitled to any of the interlocutory reliefs sought. That means that the applications by the plaintiff are without merit. Accordingly, the applications are dismissed.

45. The plaintiff will pay to the defendants, the costs of the applications.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **18th day** of **August** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

G. King'ara for the Plaintiff

Ondina for Odhiambo for the 1st Defendant

Makanga for Litoro for the 2nd Defendant.

Collins Odhiambo – Court clerk.