REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL CASE NO. 9 OF 2016

(Formerly Nakuru HCC. No. 82 of 2016)

EQUIP AGENCIES LIMITED…….....PLAINTIFF

-VERSUS-

I & M BANK LIMITED…….DEFENDANT

R U L I N G

Introduction

1. The Notice of Motion before me was filed under certificate of urgency in the High Court of Kenya, Nakuru by **Equip Agencies Limited** [the Applicant] on 30th August, 2016. **Odero J** having certified the Motion urgent granted a temporary injunction before transferring the matter to this court.

2. For the purposes of this ruling, the live prayers are:

> **"3. THAT this honourable court be pleased to grant a temporary order of injunction restraining the Defendants whether by themselves, their employees, servants, agents, or auctioneers from doing any of the following acts, that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever, completing by conveyance or transfer of any sale concluded by auction or private treaty, taking possession, appointing receivers or exercising any power conferred by Section 90 (3) of the Land Act , leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership or title to all that parcel of land known as LR. No. Gilgil Township Block 2/210 leasehold until the determination of the suit.**
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> **4. THAT an order be made under the doctrine of *lispendens* and Section 106 of the Land Registration Act (previously enshrined under Section 52 of the Indian Transfer Property Act (1959) (Repealed) that pending final determination of this suit in accordance with the law, ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, allotment, user, occupation or possession or in any kind of right, title or interest in the Charged Properties with any land registry, Government department and all other registering authorities be and is hereby prohibited in ALL THAT parcel of land known as L.R.** No. **Gilgil Township Bloc 2/210 leasehold.**
>
> **5. THATan interlocutory mandatory injunction does issue compelling the Defendantto render a true, proper and accurate account to the Plaintiff(s) and the court on the actual status of the**

charge account(s).

6. THAT an interlocutory mandatory injunction do issue compelling the Defendant to withdraw or issue an amendment notice withdrawing any adverse notice or information advanced to any Licensed Credit Reference Bureau and to expunge the Plaintiffs name from any list it has issued to any or all Credit Reference Bureaus in regard to the purported loan(s) herein.

7. THAT Costs of and occasioned by this application be provided for."

3. The application is supported by the grounds on the face thereon and the affidavit of **Divyesh Patel Indubhai** who describes himself as a Director of the Applicant Company. The undisputed and relevant background to the dispute is that the Applicant is a Limited Liability Company while the Respondent is a Commercial Bank. Parties herein had and still have a banker-client relationship during which, the Applicant obtained various facilities from the Respondent.

4. In 2011, the Applicant applied for a financial facility in the sum of Ksh. 340 million towards the purchase of, and subsequently in 2012 executed legal charge over the land parcel known as **L.R. No. GILGIL TOWNSHIP BLOCK 2/210** in return for the financial facility.This loan was to be repaid in 24 months through monthly installments of Ksh. 9 million together with interest.The sums were disbursed through the loan Account Number **[Particulars Withheld]** in the name of the Applicant.

5. In addition, the Applicant enjoyed other facilities, including overdraft and Letters of Credit. Transactions in this regard were made mainly through two separate running accounts held by the Applicant, namely Account Number [**particulars withheld]** and [**particulars withheld]**.

6. It is admitted that pursuant to the charge, certain payments were made by the Applicant in repayment of the term loan. Equally in the same period, the Applicant continued to enjoy overdraft facilities from the Respondent. As often happens, various correspondences were exchanged by the parties concerning the financial facilities in question.

7. This suit was prompted by a statutory Notice dated 13th May 2016 that was served by the Respondent upon the Applicant. The annexed Notice (Page 75 of Affidavit of Applicant) stated interalia:

"STATUTORY NOTICE OF SALE IN RESPECT OF:

CHARGE DATED 20TH DECEMBER 2011 OVER L.R. NO. 209/4535

CHARGE DATED 22ND APRIL 2013 OVER TITLE NO. GILGIL TOWNSHIP BLOCK 2/210 (LEASEHOLD); &

CHARGE DATED 4TH MARCH 2014 OVER L.R. NO. MN/VI/3075

We refer you [herein referred to as the "Chargor"] to the Charge dated 20th December 2011, 22nd April 2013, 4th March 2014 over the above mentioned properties created in favour of I & M BANK LIMITED (hereinafter referred to as "the Chargee") to secure credit and banking facilities made to UNICOM LIMITED, INTERTRACTOR COMPANY LIMITED & EQUIP AGENCIES LIMITED (hereinafter referred to as "the Borrowers"). The Charge dated 20th December 2011 was drawn to secure the total sum of Kenya Shillings Four Hundred and Fifty Million (Kshs 450,000,000.00). The Charge dated 22nd April 2013 was drawn to secure the total sum of Kenya Shilling Three Hundred and Twenty Four Million (Kshs 324,000,000.00) while Charge dated 4th March 2014 was drawn to secure the total sum of Kenya Shillings Seventy Five Million (Kshs 75,000,000.00) plus interest, costs and other expenses."

8. The Notice cited and particularized the alleged breach on the part of the Applicant to pay the outstanding principal and interest in respect of Account Number [**particulars withheld]** amounting to **Ksh555,391,983.46** and, in respect of Account Number [**particulars withheld]** a sum amounting to **Ksh 677,283,313.00**. The Notice further declared the Respondent's intention to exercise its statutory power of sale in respect of the charged property namely **L.R. No. GILGIL TOWNSHIP BLOCK 2/210,** under Section 90 (1) and (3) of the Land Act , if the Applicant continued in default and failed to rectify the default cited within 3 months of the date of service of the notice.

The Applicant's Case

9. As presented through its affidavit and legal arguments, the Applicant's grievance is firstly, that the charge executed in 2012 and registered in respect of the Land Parcel **L.R. No. GILGIL TOWNSHIP BLOCK 2/210**(the suit property) was for a loan facility of a maximum principal sum of Ksh**340 million** or less and that pursuant to the charge instrument the sum has been fully repaid as evidenced by annexed statements in respect of account number [**particulars withheld]**.

10. Regarding the Statutory Notice, the Applicant contends that the Respondent could only issue a Statutory Notice concerning default on the amounts secured by the charge over the Gilgil chattel (the original charge). And consequently, the Respondent's Notice purporting to consolidate several facilities, some of which were given without execution of legally binding memoranda or charge, hence unsecured, is illegal.

11. The Applicant has relied on Section 82 of the Land Act of 2012 and the court's pronouncement on the same in **Kisimani Holdings Ltd & Another -Vs- Fidelity Bank Ltd** as quoted in **Stephen K. Melly& 20 Others -Vs- Eco Bank Kenya Ltd [2016] eKLR.**

12. According to the Applicant, the consolidation of the Applicant's various accounts by the Respondent is unlawful because the charge over the suit properties cannot be enforced for any sums beyond the amount stated in the said charge instrument. Further the Applicant asserts that any admission of indebtedness by the applicant to the Respondent cannot be sustained in this case because they relate to "**none compliant consolidated accounts" (sic);** are based on falsified accounts provided by the Respondent; are not **"equivocal but made under duress" (sic)**. The applicant further contends that the statutory power of sale in respect of a charge cannot be exercised in regard to an indemnity or unsecured facilities but through regular court action..

13. That besides, the original charge having been fully amortized, the same cannot be extended to other debts as if it were a continuing security. Thus the unsecured sums must be realized through other means. The Applicant attacks the Statutory Notice herein as invalid for failure to comply with Section 90 (1) of the Land Act, not only for consolidating charges and facilities under different accounts but also because there exists no express provision in the charge instrument for further advances.

14. Regarding the adequacy of the impugned notice and service on particular parties, the Applicant cites the provisions Section 96 (2) of the land Act and argues that the Notice falls short of the requirements therein. In this regard reliance is placed on the decisions in **Simon Njoroge Mburu -Vs- Consolidated Bank of Kenya Ltd [2014] eKLR** and **David Ngugi Ngaari -Vs- Kenya Commercial Bank Ltd [2015] eKLR.**

15. Finally, the Applicant describes as usurious and excessive the interest levied by the Respondent and asserts it is contrary to the Banking Act. Several decisions are cited in that regard. Thus, relying on a *prima facie* case as defined in **Mrao Ltd -Vs- First American Bank of Kenya Ltd & 2 Others [2003] 1 KLR 125**, the Applicant argued that it has established a *prima facie* case with a probability of success.

16. On the question whether the Applicant stands to suffer irreparable damage, the Applicant emphasis the illegality of the Respondent's actions earlier captured which, according to the Applicant render the impugned Statutory Notice invalid. Citing several authorities including the case of **Lucy Njoki Waithaka –Vs- Industrial and Commercial Development Corporation** [citation], the Applicant argues

that a party in flagrant breach of the law ought not to be allowed to maintain an advantage derived therefrom merely because he has the ability to pay damages.

17. The Applicant also asserts the unique character, peculiar location, extensive acreage and high value of the suit property as evidence that damages would not be an adequate remedy the property being irreplaceable. That therefore the balance of convenience lies in favour of the Applicant.

18. Concerning the doctrine of *lispendens* the Applicant argues that notwithstanding the repeal of the Indian Property Transfer Act (ITPA) the doctrine is applicable by virtue of Section 3 of the Judicature Act and Section 106 of the Land Registration Act. Counsel for the Applicant Mr. Kingara cited several authorities for the proposition, among them **Surinder Kumari Mediratta -Vs- KCB & 2 Others Civil Application Nai No. 131 of 2005** and **Anne Njeri Mwangi -Vs- Co-operative Bank of Kenya [2013] eKLR**. The Applicant therefore urged the court to grant the prayers sought in the motion.

The Respondent's Response

19. In response to the Notice of Motion, the Respondent filed a Replying affidavit sworn by **Gilbert Banda** who describes himself as the Relationship Manager Corporate Division of the Respondent. Through the said affidavit and arguments made in opposition to the Notice of Motion, the Respondent presents the following case.

20. By way of background, the Respondent asserts that during the business relationship between the parties from 2007 to 2015 the Applicant executed various Letters of Offer and legal charges to secure facilities it enjoyed. In addition the Applicant executed Guarantees and Indemnity documents in the Respondent's favor. The Respondent asserts that the Applicant is bound by all the terms contained in these instruments. That the Applicant was one of the three companies under the **Equip Group** the other two being **Unicom Limited** and **Intertractor Company Limited**.

21. That under clauses 2.3 and 8.2. of the original charge instrument , the Respondent was entitled to combine or consolidate any of the Applicant's and/or the other two Equip Group companies' existing accounts . That that the Respondent registered its right to tacking and consolidation on 6/5/2013 alongside the original legal charge. The Respondent further contends that for purposes of the debt giving rise to the impugned Statutory Notice, the Applicant herein is both borrower and guarantor as part of the Equip Group together with Unicom Limited, Intertractor Company Limited.

22. That in addition the Applicant did in the course of the business relationship execute an Omnibus Counter Guarantee undertaking to "*unconditionally and on demand indemnify the Bank against all types of claims, losses, damages, charges or expenses incurred by the Bank in respect of various financial, performance and other guarantees already issued or issued in future*".

23. Further that the Omnibus Guarantee allowed the bank to recover from any property of the companies including any credit balance held by the bank or any security held by the bank on account of the Applicant and the Equip Group, by sale or otherwise. It is the Respondent's position that the Guarantee remains in force until all liabilities are discharged.

24. With regard to the contested sums in respect of the accounts number [particulars withheld**]** and [**particulars withheld]**, the Respondent states that the Applicant has admitted the debt through various correspondences, resting with the letter of 3rd September 2015 by which, the Applicant sought a restructuring of the then outstanding facilities amounting to Ksh 1,100,000,000/= into an overdraft facility of **Ksh 500 million and a term of loan of Ksh 600 million**.

25. And that pursuant to the request, a Letter of Offer by the bank was accepted by the Applicant through the execution of a Memorandum of Acceptance. Under the arrangement, the interest rate on the term loan was to be determined at the discretion of the bank subject to the Kenya Shillings Bank Rate plus 10.13 %. According to the Respondent the new facility was secured by the existing securities in the Schedule of the Letter of Offer which include the legal charge over Land Parcel **L.R. No. GILGIL TOWNSHIP**

BLOCK 2/210.

26. Pointing to clause 20 of the Letter of Offer, the Respondent states that as at 10th November 2015, the Applicant admitted indebtedness in respect of the overdraft to the tune of Ksh 1,113,017,032 and Ksh 220,260,000/= in respect of the Letters of Credit.

27. The Respondent submits that the Applicant is bound by the terms of the Letter of Offer and in light of default on its part, the Respondent's statutory power of sale has arisen and the Respondent is entitled to realize any security of its choice to recover the outstanding debt. The Respondent asserts that the Applicant is undeserving of the orders sought as it is guilty of material non-disclosure in particular, its assertion that it has cleared the very debt admitted in the Letter of Offer executed in November, 2015.The case of **Orion East Africa Ltd -Vs- Ecobank Kenya Ltd & Another [2015] eKLR** is cited on that account.

28. It is the Respondent's position that the Applicant cannot be allowed to challenge the validity of the original legal charge having incurred the restructured debt. Reliance was placed in the decisions in **Mrao Ltd supra, Al Jalal Enterprises Limited -Vs- Gulf African Bank Ltd [2014] eKLR** and **Milimani Motors (K) Ltd -Vs- Kenya Commercial Bank Ltd [2014] eKLR**. With regard to the Applicant's reliance on Section 82 and 84 of Land Act, the Respondent urged the court to give meaning to Section 104 of the Act by considering whether it is equitable to grant an injunction in this case in view of the amount involved.

29. According to the Respondent, a dispute on interest or amounts payable in respect of the debt does not entitle an Applicant to an injunction who guilty of default. For this proposition the case of **Argos Furnishers Ltd -Vs- Ecobank Kenya Ltd & Another [2014] eKLR)** is cited. The case of **Nduati Kariuki t/a Johester Merchants -Vs- National Bank of Kenya [2006] eKLR** was cited by the Respondent in answer to the Applicant's argument regarding the peculiarity and uniqueness of the suit property. Thus the Respondent's position is that the Applicant will not suffer irreparable damage.

30. Regarding the application of the doctrine of *lispendens* the Respondent asserts that a doctrine of common law cannot override a statutory provision, in this case Section 164of the Land Act which ousted the application of the ITPA. Secondly, that the doctrine cannot apply where the mortgagee's statutory power of sale has arisen. For this submission the Respondent relied on the case of **Aprotech Services Ltd Vs Savings Loan Kenya Ltd [2001] LLR 1498 (CCK)** and **Al-Jalal Enterprises Ltd** (supra). Thus the Respondent concluded that the application does not deserve.

31. In a brief response to the Respondent's case, the Applicant argued that the Respondent had not demonstrated the particular legal instrument that allows for its exercise of the impugned statutory power of sale. The Applicant finally asserted that while the debt claimed by the Respondent was not denied, the same was not part of the charge; and that any consolidation was by virtue of the law subject to the original charge ceilings. He said that the original charge has been fully liquidated.

Analysis and Determination

32. The court has considered the material and arguments canvassed by the respective parties in respect of the Notice of Motion. From the Applicant's opening and closing arguments, it seemed to me that the Applicant was in principle not denying that it owes the debt herein to the Respondent. However, it was disputing the consolidation of the original legal charge in respect of the suit property and other charges to cover outstanding debts in respect of the facilities other than the sum of Ksh340 million advanced under the former. Thus its position was that the "original" charge was fully paid. However, other grounds and arguments raised in between the Applicant's submissions, which particularly challenge the validity of the original charge, the payable interest, and admissions of debt by the Applicant seemed to qualify the Applicant's stated position that the debt is not disputed.

33. Thus the observation by the Respondent's counsel Mr. Wawire that the Applicant has assumed contradictory positions in the matter. Be that as it may, as I understand the chief plank in Applicant's

legal and factual grounds supporting the Notice of Motion is clearly the question, whether the Respondent was entitled to consolidate its several accounts and thereby treat the Gilgil chattel as a continuing security for other outstanding facilities giving rise to the impugned Statutory Notice.

34. Therefore, although the Respondent did not explicitly dispute the Applicant's insistence to have cleared the facility of Kshs 340,000,000/= in respect of the original charge, the question while relevant is not in my view materially significant. This is because the Respondent's material demonstrates that the Statutory Notice that has prompted this dispute was raised in respect of two accounts namely [particulars withheld]and [particulars withheld] These accounts are clearly distinct from the Gilgil Charge account [particulars withheld] through which the sum of Shs 340 million was disbursed.

35. For my part, having perused the annexed bank statement at page 56 of the Applicant's documents, whose last entry is dated 11th March 2015, it would seem that on the said date the account was regular, and not in arrears.

36. Therefore considering whether the Applicant has established a *prima facie* case, the court has to attempt to answer the question whether the Respondent's admitted consolidation of several facilities and retention of the charge over the Gilgil Chattel for what appears to be debts other than the loan of Shs 340 million is *prima facie* lawful. And ultimately whether the Respondent's power of statutory sale has arisen, or the Applicant's complaint represents a grievance requiring a rebuttal per the ratio in the case of **Mrao (supra).**

37. In this connection, the Applicant has hoisted its main objection on the provisions of Section 83 (1) of the Land Act of 2012 which provides that:

> **"Unless there is an express provision to the contrary clearly set out in the Charge instrument, a chargor who has more than one charge with a single charge on several securities may discharge any of the charges without having to redeem all charges."**

Section 83 (2) of the Land Act requires that the right to do a consolidation of accounts be registered against all charges.

38. Similarly, a charge instrument may make provision for the giving of further advances or credit to the chargor on a current or continuing account under Section 82 of the Land Act. Citing Clause 8.4 of the original charge, the Applicant argues that the original charge instrument stipulates that the upper limit of the facility is Ksh340,000,000/= or less and thus the Respondent could not tack in this case at it has purported to have done.

39. The Respondents answer to the above matter as contained in paragraph 8 of the Replying Affidavit is borne out by the Plaintiff's annextures. Specifically, the right to tacking at clause 8.5 of the Charge Instrument and at Page 3 of the annexures the registration on 6/5/2013 of the right to tack. Clause 2:3 of the charge instrument provides for the right of the Respondent's to consolidate *"without notice notwithstanding any settlement of account or other matter whatsoever"* to combine or consolidate the Applicant's account and in satisfaction of any obligations or liabilities whether **"present, future, actual, contingent primary collateral or joint".** Further clause 8.2 allows for the consolidation of charge securities and charges that *"the chargee may from time to time hold from the chargor on any accoun*t *whatsoever"*.

40. With regard to the debt giving rise to the impugned Statutory Notice, the Applicant appears to agree that it has utilized the overdraft facilities as reflected in its letter to the Respondents dated 18th May 2015 and 16th July 2015 and 3rd September, 2015 (pages 33 – 36) of the Replying affidavit. The claim made during the hearing of the application that these letters, if they amount to an admission of indebtedness were not unequivocal or were written under duress in my view is not authentic. Seemingly, despite these allegations of coercion, the Applicant took no action thereafter and it was only jolted into action by the Statutory Notice served almost 9months after the letter of 9th September, 2015.

41. In the same vein, the Applicant while appearing to admit the execution of the Letter of Offer on Page 1 -14 of the Replying Affidavit asserts that the same was procured through threats conveyed in correspondence by the Respondents to report its default to the listed Credit Reference Bureau. Although I have not seen the Respondent's "threat" letter of 1st August 2015 in the in the bundle, the Applicant's letter of 3rd September, 2015 purporting to respond thereto refers to "deliberations" and "agreement" between it and the Respondent and clearly admits that its credit facility was in arrears. Where is the coercion or duress?

42. The Respondent has exhibited the Letter of Offer and Acceptance (contained at pages 1 – 14) in respect of the request of the Applicant vide the letter of 3rd September,2015 for the restructuring of its debt. It is true that the copy of the Letter of Offer presented in court is of poor quality, but it is legible. The same is dated 11th November 2011. Despite the Applicant having on the face of it executed the Letter of Offer and acceptance attached thereto (pages 12 – 14) the Applicant now queries the calculation of interest, asserting in its Further Affidavit that the same was "overcharged". That accordingly, the Applicant "*totally disowns the contents of the illegible letter ……based on falsified amounts."* And also reiterates that the charge over the Gilgil property was not created to secure any of the amounts in the Letter of Offer and Acceptance.

43. Firstly, concerning the accuracy of the interest charged on the disclaimed debt, it is my view that the Applicant cannot at this stage shield itself behind such an objection. Not only has the Applicant failed to demonstrate how it has arrived at its "accurate" figure, but also the law is not on its side. In the case of Iqbal Transporters Ltd (supra) the court stated that the Applicant is obligated to demonstrate the breach of terms of the charge instrument in respect of the agreed rate of interest. It was not enough for the Applicant to throw what it considers the proper chargeable interest in the court's face as it seems to have done here.**(See also Argos Furnishers Ltd -Vs- Ecobank Kenya Ltd).**

44. The Applicant's objection to the consolidation of accounts in this case also raises a corollary question: Could the parties to the "original" charge instrument vary any of the terms thereof. The answer seems, contrary to the Applicant's assertion, to be yes. Section 84 (1) to (4) of the Land Act provides for variation of terms in respect of interest, the amount secured or other term, provided that a Memorandum in that regard is endorsed in the register or annexed to the charge instrument. The Respondents hold out the Acceptance at pages 12 – 14 of the documents annexed to the Replying affidavit as the Memorandum executed in respect of the restructured debt.

45. The Applicant cited the case of **Joseph Mathenge Kamutu -Vs- Joseph Wainana Karanja & Ano. [2015] eKLR** to impugn the said Letter of Offer as an illegality which cannot be enforced. The caption of the judgment cited contains a correct statement of the law. The Latin maxim *ex turpi causa non orituractio* still holds true: courts will not enforce contracts whose objects are proscribed by the law. No nexus has been made however between the impugned Letter of Offer and illegality as countenanced in the authority cited. In other words, the Applicant did not show, firstly how the Letter of Offer violates the provisions of Section 84 of the Land Act.

46. But more importantly, the clauses in the original charge earlier highlighted clearly allow the impugned consolidation and tacking of accounts, in addition to the consolidation of charges, and the making of further advances to the charger under the charge. And while clause 8.4 of the charge instrument appears to limit such advances to the principal sum in the charge, this term too is subject to the parties' mutual variation under Section 84 of the Land Act.

47. And in this case, it does seem to me reading through all the relevant terms of the original charge on that account, the Applicant's admitted request for the restructuring of the debt, the executed Letter of Offer and acceptance that indeed the parties mutually agreed to vary the terms of clause 8.4, principally because the Applicant had run into arrears. Section 84 of the Land Act in essence embodies the freedom of parties entering into contracts, and the court, save where there is demonstrated illegality or good cause, cannot ride roughshod on the parties' stated intentions by purporting to rewrite such contracts.

48. Indeed regarding the complaint that the debt claimed exceeds the sum in the original charge, it is hard

to tell, on the material before me, how much of the restructured debt was accrued interest and therefore whether the 'sum advanced' subsequently exceeded the principal sum in the original charge. Suffice to say that the Applicant having enjoyed the facilities offered by the Respondent that gave rise to the questioned debt, cannot be heard to say that the debt exceeded the principal sum in the original charge.

49. Returning therefore to the question whether the Applicant has established a prima facie case, as described in the **Mrao case**, it is my view that the Applicant's case appears tenuous. To say nothing of the alleged invalidity of the "original" charge, which the Applicant inexplicably also relies on to make its case, the purported illegality regarding the consolidation of the Applicant's various accounts, and of charges has not been demonstrated. Similarly submissions relating to the inadequacy of the Statutory Notice are in my view baseless in so far as they are based on the alleged illegal consolidation.

50. The Statutory Notice as drawn, to my mind appears to comply with the provisions of Section 96 of the Land Act. The objections taken concerning the adequacy of the Notice or service thereof did not appear serious at all. Besides, under Section 104 (2) of the Land Act not every error in a notice is sufficient to vitiate a notice. The relevant portion of the section is subsection 2(d) which is in the following terms:

> **"(d) authorise or approve the remedy applied for or proposed by the chargee, notwithstanding that some procedural errors took place during the making of any notices served in connection with that remedy if the court is satisfied that-**
>
> **(i) the chargor or other person applying for relief was made fully aware of the action required to be taken under or in connection with the remedy; and**
>
> **(ii) no injustice will be done by authorising or approving the remedy, and may authorise or approve that remedy on any conditions as to expenses, damages, compensation or any other relevant matter as the court thinks fit."**

51. I think I have said enough to demonstrate that the Applicant has not overcome the first hurdle that requires it to establish a *prima facie* case with a probability of success. On the second principle enunciated in **Giella -Vs- Cassman Brown & Co. Limited [1973] EA 358,** the Applicant's assertions that the Gilgil asset has a high value and is a unique and irreplaceable asset do not carry weight, especially when the allegations of illegal actions on the part of the bank are so attenuated.

52. The decision in **Lucy Njoki Waithaka (supra**) cited by the Applicant is not helpful in this case. The Applicant herein is admittedly in default in respect of colossal sums of money owed to the Respondent. Its argument that the security is irreplaceable smacks of indifference to the Applicant's outstanding obligations to the Respondent. This assertion appears to turn the concept of collateral as we know it on its head: financiers accept a borrower's collateral based on its value, and once in default, the borrower cannot continue to cling onto the collateral citing its high value or uniqueness.

53. Finally, the balance of convenience does not tilt in favour of the Respondent notwithstanding its commitments to tenants of the suit property or investments therein. In addition, sight must not be lost of the fact that an injunction is an equitable remedy. It seems to me that the Applicant having been indulged through a restructuring of the debt outstanding to the Respondent continued in default.

54. And upon being served with Statutory Notice waited until the eleventh hour to approach the court, without as much as disclosing that indeed the debt claimed in the Notice emanated from the Applicant's request for the restructuring of its debt. While emphasizing that the original charge was fully paid, the Applicant was reticent on the matter of the debt restructuring only disclosing in a somewhat vague manner that the Respondent used coercion against the Applicant, rather than the full facts. For instance at Paragraph 15 of the affidavit of **Divyesh Indubhai Patel** is an oblique reference to the Letter of Offer and Acceptance which however the Applicant did not annexe to its documents.

55. When subsequently confronted with the Letter of Offer at pages 1 – 14 of the Respondent's annextures, the Applicant disparages it and other apparent admissions of indebtedness as unenforceable.

More significantly, the Applicant seemed unable to decide whether or not it owes the money claimed in the Statutory Notice to the Respondent. The courts have always emphasized that a party seeking *exparte* orders ought to make a full disclosure and in appropriate cases, have not hesitated to set aside orders obtained through the suppression of material facts. An Applicant who on the face of it is guilty of such concealment cannot expect to attract the sympathies of a court of equity.

56. With regard to the doctrine of *lispendens*, the same cannot override the protected right of a chargee to realize securities in the event of default by the chargor. Nothing turns on that point therefore. **(See decisions in Aprotech Services Ltd and Al Jalal Enterprises Ltd (supra).**

57. For all the foregoing reasons, prayer 3 and 4 of the Notice of Motion cannot be granted. And for the same reasons, the Applicant's case does not rise up to the necessary threshold for the granting of an interlocutory mandatory injunction as stated in the case of **Kenya Breweries Ltd –Vs- Washington Okeyo Civil appl. NO. 332 of 2000 (UR)**.:

> ***"A mandatory injunction can be granted on an interlocutory application as well as at 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 ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application."***

58. Accordingly, prayers 5 and 6 of the Notice of Motion similarly cannot issue. The Notice of Motion therefore fails in its entirety and is dismissed with costs.

Delivered and signed at Naivasha this 9th day of December, 2016.

In the presence of:

For Plaintiff Applicants : Mr. Njenga holding brief for Mr. Kingara

For Defendant/Respondents : Mr. Wawire

Court Assistant : Barasa

C. W. MEOLI

JUDGE